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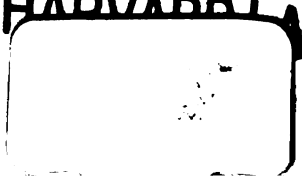

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

NOVEMBER, 1897–JULY, 1898.

VOL. LXX.

BY JAMES P. ANDREWS.

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JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. CHARLES B. ANDREWS, CHIEF JUSTICE.
HON. DAVID TORRANCE.
HON. SIMEON E. BALDWIN.
HON. WILLIAM HAMERSLEY.
HON. FREDERICK B. HALL.

JUDGES OF THE SUPERIOR COURT.

HON. SAMUEL O. PRENTICE.
HON. JOHN M. THAYER.
HON. SILAS A. ROBINSON.
HON. GEORGE W. WHEELER.
HON. RALPH WHEELER.
HON. MILTON A. SHUMWAY.
HON. WILLIAM T. ELMER.
HON. ALBERTO T. RORABACK.

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The Statute Book referred to in this volume as the Revised Statutes or General Statutes, is the Revision of 1888.

The month given at the top of each page is that within which the opinion was filed.

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TABLE OF THE CASES REPORTED.

	Page
Aldrich et al., Brewster *v.*	51
Allen, Johnson *v.*	738
Anderson et al. *v.* Town of New Canaan,	99
Appeal from Probate, Chamberlin, Executor,	363
Clarke's,	195, 483
Guinan's,	342
Wheeler's,	511
Woodbury, Trustee,	455
Ashborn *v.* Town of Waterbury,	551
Benham et al., Brooks *v.*	92
Bennett, Executor, *v.* Packer et al.,	357
Bergin, Admr., *v.* Southern New Eng. Tel. Co. et al.,	54
Betts, Cantoni et al. *v.*	386
Brewster *v.* Aldrich et al.,	51
Bridgeport (City), Swan et al. *v.*	143
Bristol (Town) *v.* New England Railroad Co.,	305
Brooks *v.* Benham et al.,	92
Buckley *v.* Kelly,	411
Byington, McKeon *v.*	429
Cantoni et al. *v.* Betts,	386
Chamberlin, Executor, Appeal from Probate,	363
Channon *v.* Sanford Company,	573
Clarke's Appeal from Probate,	195, 483
Cohen *v.* Schneider et al.,	505
Commander *v.* Hahn,	746
Cone *v.* Sedgwick et al.,	746
Court Harmony, A. O. F., *v.* Court Lincoln, A. O. F.,	634
Cummings *v.* City of Hartford,	115
Curnane *v.* Scheidel,	13
Cutler et al. *v.* Royal Insurance Company,	566

Digitized by Google

Page

Dowling et al., Southey et al. *v.* 153

East Hartford (Town) et al., Goodwin *v.* . . 18

Fair Haven & Westville R. Co., New York, etc., R. Co. *v.* 610
Farmington (Town), Hills et al., Executors, *v.* . 450
Fielding *v.* Silverstein, ... 605
Fisk et al. *v.* City of Hartford, ... 720
Foskett and Bishop Company *v.* Swayne et al., . . 74
Fox *v.* Hartford & West Hartford Horse R. Co., . 1
Fuller et ux. *v.* Metropolitan Life Insurance Co., . 647

Goodwin *v.* Town of East Hartford et al., . . . 18
Greeley and Company Receivership, *In re* the E. S., 494
Guinan's Appeal from Probate, ... 342
Gustafson et ux. *v.* Rustemeyer, ... 125

Hahn, Commander *v.* 746
Hanley, State *v.* 265
Harbor Commissioners, Lane *v.* 685
Harbourne, State *v.* 484
Hartford (City), Cummings *v.* 115
Hartford (City), Fisk et al. *v.* 720
Hartford & West Hartford Horse R. Co., Fox *v.*, . 1
Healey et al., Executors, *v.* Healy et al., . . . 467
Hewit et al. *v.* New York, N. H. & H. R. Company, . 637
Hills et al., Executors, *v.* Town of Farmington, . 450
Holgenson et al., Jacobs, Treasurer, *v.* . . . 68
Holohan et al., Lawlor *v.* 87
Hubbard *v.* New York, N. H. & H. R. Company, . 563
Hygeia Distilled Water Co. *v.* Hygeia Ice Co., . 516

In re Application of the Shelton Street Railway Co., . 329
The E. S. Greeley and Company Receivership, . 494
Premier Cycle Manufacturing Company, . . 473
Wilcox and Howe Company, ... 220
Isbell, Lovejoy et al. *v.* 557
Jackson et al., Post, Executor, *v.* 283

Digitized by Google

Page
Jacobs, Treasurer, *v.* Holgenson et al., . . . 68
Johnson *v.* Allen, ... 738
Jones *v.* Town of Marlborough, ... 583

Kallaher, State *v.* 398
Kashman *v.* Parsons, ... 295
Kelly, Buckley *v.* 411
Knights of Columbus *v.* Rowe et al., ... 545

Lane *v.* Harbor Commissioners, ... 685
Lawlor *v.* Holohan et al., ... 87
Litchfield County, Town of New Milford *v.* . . 435
Loomis *v.* Perkins et al., ... 444
Lovejoy et al. *v.* Isbell, ... 557
McBarnard *v.* Kelly
McKeon *v.* Byington, ... 429
McNamara, Vincent *v.* 332
McQuillan *v.* Willimantic Electric Light Company, . 715
Marlborough (Town), Jones *v.* 583
Masonic Mutual Benefit Association *v.* Tolles et al., . 537
Metropolitan Life Insurance Co., Fuller et ux. *v.* . 647
Morehouse *v.* Morehouse, ... 420
Munger et ux., Wildman *v.* 380

National Cash Register Company *v.* Woodbury, . . 321
New Britain (City), Roper *v.* 459
New Canaan (Town), Anderson et al. *v.* . . . 99
New England Railroad Company, Town of Bristol *v.* 305
New Haven (City), N. Y., N. H. & H. R. Co. et al. *v.* . 390
New Milford (Town) *v.* Litchfield County, . . 435
New York, etc., R. Co. *v.* Fair Haven & West-
ville R. Co., ... 610
Hewit et al. *v.* 637
Hubbard *v.* 563
v. City of New Haven, ... 490
Nolan, Administratrix *v.* 159
Wheeler et al. *v.* 326
Nichols *v.* Peck, ... 439
Nolan, Administratrix, *v.* N. Y., N. H. & H. R. Co., . 159

Digitized by Google

Page

Packer et al., Bennett, Executor, *v.* 357
Parsons, Kashman *v.* 295
Peck, Nichols *v.* 439
Perkins et al., Loomis *v.* 444
Porter *v.* Ritch et al., ... 235
Post, Executor, *v.* Jackson et al., ... 283
Pratt et al., Sweeney *v.* 274
Premier Cycle Manufacturing Company, *In re.* . 473

Randall et al., Ruggles, Executor, *v.* 44
Ritch et al., Porter *v.* 235
Rookey *v.* The State, ... 104
Roper *v.* City of New Britain, ... 459
Rowe et al., Knights of Columbus *v.* 545
Royal Insurance Company, Cutler et al. *v.* . . 566
Ruggles, Executor, *v.* Randall et al., ... 44
Rustemeyer, Gustafson et ux. *v.* 125

Sanford Company, Channon *v.* 573
Scheidel, Curnane *v.* 13
Schneider et al., Cohen *v.* 505
Scholfield Gear and Pulley Company *v.* Scholfield, . 500
Schroeder *v.* Tomlinson, ... 348
Security Company *v.* Snow et al., ... 288
Sedgwick et al., Cone *v.* 746
Shailor, Sullivan *v.* 733
Shelton Street Railway Co., *In re* Application of . 329
Silverstein, Fielding *v.* 605
Snow et al., Security Company *v.* 288
Southern New Eng. Tel. Co. et al., Bergin, Admr., *v.* 54
Southey et al. *v.* Dowling et al., ... 153
State *v.* Hanley, ... 265
v. Harbourne, ... 484
v. Kallaher, ... 398
v. Travelers Insurance Company, ... 590
State, Rookey *v.* 104
State Bank of the City of New York *v.* Waterhouse, Jr., 76
Sullivan *v.* Shailor, ... 733
Swan et al. *v.* City of Bridgeport, ... 143

Digitized by Google

Page

Swayne et al., Foskett and Bishop Company *v.* . 74
Sweeney *v.* Pratt et al., ... 274

Tolles et al., Masonic Mutual Benefit Association *v.* . 537
Tomlinson, Schroeder *v.* 348
Travelers Insurance Company, State *v.* 590

Vincent *v.* McNamara, ... 332

Waterbury (Town), Ashborn *v.* 551
Waterhouse, Jr., State Bank of the City of New York *v.* 76
Wheeler et al. *v.* New York, N. H. & H. R. Co., . 326
Wheeler's Appeal from Probate, ... 511
Wilcox and Howe Company, *In re*, ... 220
Wildman *v.* Munger et ux., ... 380
v. Wildman, ... 700
Willimantic Electric Light Company, McQuillan *v.* . 715
Woodbury, National Cash Register Company *v.* . 321
Trustee, Appeal from Probate, ... 455

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

HORACE W. FOX *vs.* THE HARTFORD & WEST HARTFORD HORSE RAILROAD COMPANY.

First Judicial District, Hartford, October Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Certain coupon bonds issued by the defendant company and owned by *H*, its president, while held by the plaintiff as collateral security for a debt due him from *H*, were conveyed by the latter to the plaintiff, by a written instrument, and thereby became the plaintiff's absolute property. In consideration of this conveyance the plaintiff, in the same instrument, agreed to sell and deliver the bonds to *H* upon payment of a specified amount within a limited time. Nothing was said by either party as to the coupons. In an action against the obligor, after the time allowed for *H* to repurchase the bonds had expired, to recover the amount of the unpaid coupons, it was *held*:—

1. That upon these facts the trial court was fully justified in holding that the title to the coupons passed to the plaintiff with the bonds.
2. That evidence of the price the plaintiff had obtained for certain shares of stock which also became his absolute property by virtue of the aforesaid conveyance, was irrelevant, and properly excluded; as was also evidence of the secret intent of *H* not to transfer the coupons with the bonds.
3. That a previous "arrangement" or understanding between the defendant and *H*, that he was not to present the coupons for payment until it was convenient for the company to pay them, was unavailing as a defense against coupons overdue at the date of their transfer to the plaintiff, inasmuch as it did not appear that such arrangement constituted a valid contract obligatory upon *H*, in whose shoes the plaintiff stood.

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4. That interest upon the coupons from the time of their presentation for payment was properly allowed.

The case of *Rose* v. *Bridgeport*, 17 Conn. 243, limited and distinguished.

[Submitted on briefs October 5th—decided November 30th, 1897.]

ACTION to recover the amount of eighteen coupons attached to bonds of the defendant, brought to the Court of Common Pleas in Hartford County and tried to the court, *Peck, Associate Judge;* facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The coupons in suit were attached to six bonds, three coupons to each bond; one of the three coupons upon each bond maturing February 1st, 1895, one August 1st, 1895, and one on February 1st, 1896; and the form of each coupon was as follows:—

Coupon.

The Hartford & West Hartford Horse Railroad Company will pay the bearer twenty-five dollars ($25) at the City Bank in the city of Hartford, Connecticut, on the first day of , for semi-annual interest on Bond No. , dated August, 1894.

25 Dollars. W. E. Goodwin, *Treas.*

Prior to January 4th, 1896, the bonds and coupons in question were the property of David Henney, who, being indebted to the plaintiff on two stock notes of the face value of $4,500, to secure said notes had given the plaintiff the bonds in question with the coupons attached thereto, and also the stock mentioned in the contract hereinafter set forth; and on the 4th of January, 1896, these securities were in the plaintiff's possession. Said stocks and bonds were of the par value of $14,500, but were of uncertain market value and not readily salable.

On the 4th day of January, 1896, Henney and the plaintiff signed the following contract (Exhibit A): "Whereas David Henney has this day conveyed to me for a valuable consideration by him received, certain stocks and bonds, namely, (340) three hundred and forty shares of Hartford Light and

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Power Co., capital stock, represented by certificate No. 229, and (6) of the first mortgage bonds of The Hartford & West Hartford Horse R. R. Co. for ($1,000) one thousand dollars each, the same being my absolute property: Now, therefore, I hereby agree to sell and deliver to the said David Henney the aforesaid shares of stock and the bonds aforesaid, upon the payment to me in hand of the sum of ($5,000) five thousand dollars on or before January 10th, 1896. David Henney, H. W. Fox. Hartford, Conn., January 4, 1896."

Upon the signing of this contract the plaintiff delivered up to Henney the notes in his possession, and retained possession of the bonds with the coupons thereto attached. Nothing was said between the contracting parties as to whether or not the coupons passed with the bonds. The plaintiff or his bookkeeper, on or before the date of said contract, figured in pencil on said stock notes the accrued interest to January 1st, 1896, which made the entire indebtedness $4,875.80. This was done in the expectation that said notes would be paid about January 1st, 1896, and to determine the amount due. As they were not paid, the arrangement expressed by the contract aforesaid, was made. Henney has never paid said notes, except by the transfer of said securities, nor the $5,000 mentioned in the contract. He never asked the plaintiff for the coupons, but about February 1st, 1896, he notified the bank not to pay them, and notified the plaintiff that he had done so. Henney was president of the defendant company, and had had an arrangement with the company not to present the coupons for payment until it was convenient for it to pay them. The plaintiff had no knowledge of such arrangement. It was not questioned that the plaintiff was the owner of the bonds by virtue of the contract aforesaid and the transaction connected therewith; and it was admitted that he had such title to the coupons, if any, as was given by said contract and said transaction. The plaintiff duly presented the coupons for payment, and they had not been paid.

Upon these facts the defendant claimed that the coupons in question did not pass to the plaintiff with the bonds, but

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remained the property of Henney. The court did not so hold, but held that the coupons passed to the plaintiff with the bonds.

The defendant also claimed that as two of the coupons on each bond were overdue at the time of said transaction, the plaintiff took them subject to the arrangement between Henney and the defendant company, but the court did not so hold.

On the trial the defendant asked the plaintiff on cross-examination the following question: "Have you sold, since taking this document, the Light and Power stock, whose par value is $25, at $20 a share?" This evidence was offered for the purpose of showing that the debt to Fox, represented by the notes, was fully paid, and more than paid, by the sale of Light and Power stock; and for the purpose of proving that the coupons were not the property of the plaintiff, in connection with evidence thereafter to be offered to show that, notwithstanding Exhibit A, he still held at the time of said sale both stock and bonds simply as collateral for the notes. The court excluded the question, and the defendant took an exception. No such testimony as was proposed to be offered in connection with the above question was afterward introduced or offered by the defendant.

The plaintiff afterward having testified that he had traded said stock with one Olmstead, the defendant asked him: "At what price did the stock go into the trade with Olmstead?" The court excluded the question, and the defendant took an exception.

The defendant offered said Henney as a witness, and during his examination asked him: "Was it your intention to convey the coupons?" The court excluded the question, and the defendant took an exception.

The trial court found that said coupons were conveyed to the plaintiff as incident to the bonds, in payment of said stock notes. The court also held that the possessory title of the plaintiff was sufficient to entitle him to recover in this action, and rendered judgment in his favor for the amount of the coupons, with interest from the first day of February,

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1896, when they were presented for payment. No claims were made by either party during the trial as to whether interest should or should not be allowed.

William F. Henney, for the appellant (defendant).

Since the question of ownership was raised by the pleadings, proof of that fact is essential to recovery. Proof of possession, under the circumstances of this case, is not enough. *Pendleton County* v. *Aimee*, 13 Wall. 297. Inasmuch as the coupons in question, with the possible exception of the coupon maturing February 1, 1896, were overdue at the time of the transaction set forth in Exhibit A, the plaintiff took them subject to all the equities in favor of the defendant company. Jones on R. R. Securities, § 324; *Arrants* v. *Commonwealth*, 18 Gratt. 750; *Gilbo* v. *Norfolk & Petersburg R. Co.*, 1 Hughes, 410; Jones on Pledges, § 675, and authorities there cited. The coupons in question are not the property of the plaintiff, and the company, having been notified not to make payment to him, cannot properly do so. As the plaintiff bases his title to the coupons solely upon title to the bonds, it is clear from the premises that he has no title to the coupons whatever. The ownership of bonds is never proof of title to coupons belonging thereto. All our courts have uniformly regarded them, when made payable to bearer, simply as negotiable instruments. They may be sued upon without producing the bonds, and the owner may bring his action without having any interest in the bond itself. *Thomson* v. *Lee County*, 3 Wall. 332; *Aurora City* v. *West*, 7 id. 105. It was error to allow interest on the coupons. *Rose* v. *Bridgeport*, 17 Conn. 243. No interest was claimed by plaintiff in evidence or upon argument; hence defendant had no occasion to make any adverse claim.

Sidney E. Clarke, for the appellee (plaintiff).

Upon the facts admitted or proven, the court rightfully found that the coupons passed to the plaintiff with the bonds. Such an arrangement as was testified to by the president of the defendant, would not dishonor the bonds or coupons in

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plaintiff's hands, without notice. There was no error in holding that the plaintiff took them free from the arrangement between the company and its president. *Roe* v. *Jerome*, 18 Conn. 138; *Starr* v. *Anderson*, 19 id. 341; *New York & N. E. R. Co.* v. *New York & N. H. R. Co.*, 52 id. 282; *Credit Co.* v. *Howe Machine Co.*, 54 id. 389; *Chase's Appeal*, 57 id. 263. The testimony offered to contradict the terms of Exhibit A was rightly excluded by the court. *Caulfield* v. *Hermann*, 64 Conn. 325. For the same reasons the testimony as to Henney's intention was properly excluded. An intended contract not made cannot be set up in place of one made. *Sanford* v. *Howard*, 29 Ala. 684. It is error to admit oral testimony of the intentions with which a writing is executed. *Watson* v. *Watson*, 24 S. Car. 229; *Morris* v. *Robinson*, 80 Ala. 291. The language of a written contract, while it is in force, is the only legitimate evidence of what the parties intended and understood by it. *West Haven Water Co.* v. *Redfield*, 58 Conn. 39. Interest was properly allowed. *Selleck* v. *French*, 1 Conn. 33; *Jones* v. *Mallory*, 22 id. 392; *Hubbard* v. *Callahan*, 42 id. 529. In *Rose* v. *Bridgeport*, 17 Conn. 247, suit was brought to recover on three coupons, with interest by way of damages. The coupons, however, were not of the character of those in question. The inference from the opinion is, that if the coupon had been an independent collateral promise to pay a sum certain on a certain date, the court would have found that the holder was entitled to damages for non-payment of the coupon. 2 Danl. on Neg. Inst. (3d ed.) §§ 1513, 1514, and cases cited; *Aurora* v. *West*, 7 Wall. 82; *Spencer* v. *Higgins*, 22 Conn. 529; *Crosby* v. *New London, W. & P. R. Co.*, 26 id. 125, 126; *Peoples' Savings Bank* v. *Norwalk*, 56 id. 547–554.

TORRANCE, J. In his reasons of appeal the defendant claims, in substance, that the trial court erred: (1) in holding that the title to the coupons passed to the plaintiff with the bonds; (2) in excluding certain testimony; (3) in holding that the plaintiff did not take the overdue coupons

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subject to the "arrangement" between Henney and the defendant; (4) in allowing any interest upon the coupons.

These claims will be considered in the order stated. We are of opinion that there was no error in holding, upon the facts found, that the plaintiff, as the undisputed owner of the bonds, also owned the coupons. The bonds with the coupons attached to them were voluntarily delivered to the plaintiff by the defendant, at some time prior to the making of the contract, by way of pledge for a debt. The plaintiff, from the time this pledge was made to the time the contract was made, with the full knowledge and assent of the defendant, held both the bonds and the coupons as security for his debt. The bonds were of uncertain market value and not readily salable. Just before the making of the contract, then, Henney owned the bonds and the coupons, and both were in the possession of the plaintiff by way of pledge. It was under these circumstances that the transaction of January 4th, 1896, took place. By that transaction it is conceded that the plaintiff became the absolute owner of the bonds which were then in his hands, subject only to Henney's right to repurchase as provided for in the contract; and by it, also, Henney's debt to the plaintiff was paid, and the stock notes were surrendered to Henney. At the time Henney thus transfers the title to the bonds to the plaintiff, he does not ask to have the coupons surrendered to him, nor does he in any way intimate that they are not to pass with the bonds, and the plaintiff, with Henney's full consent, retains possession of them. Upon these facts the inference is well nigh irresistible that the parties intended that the coupons should pass with the bonds.

About the only fact claimed to be adverse to this conclusion, is the fact that nothing was said one way or the other about the coupons; but this fact is only one of evidential value, and as such is of comparatively slight importance; certainly by itself it is by no means conclusive. Suppose the bonds with the coupons attached had been in Henney's hands when the contract was made, and pursuant to its provisions he had passed the bonds with the coupons attached over to

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the plaintiff; could there be any reasonable doubt that he intended to transfer the coupons as well as the bonds, even if nothing had been said about the coupons? We think not.

Upon the facts found, and with reference to the point now under consideration, the present case does not essentially differ from the case supposed. The trial court was fully justified in holding that the coupons passed to the plaintiff with the bonds.

The court excluded evidence of the amount realized by the plaintiff from the disposition of the Light and Power Company stock, and of this the defendant complains. Upon the conceded facts in the case, it is difficult to see how the defendant had any interest in this matter. Henney might have had such an interest, but he was not a party. That evidence was admissible only on the theory that the stock when disposed of, was held merely as collateral for Henney's debt, and that this point was in issue in the case. But the uncontradicted evidence in the case showed that the stock was the plaintiff's absolute property, and no evidence was offered to show that it was not; and furthermore the point was not in issue. The evidence, for all the purposes for which it was offered, was irrelevant and was rightly excluded.

Henney as a witness was asked, "Was it your intention to convey the coupons?" The question really called for evidence of the actual, secret, unmanifested intention of Henney, which, under the circumstances, was of no legal significance.

The real question was as to his manifested intention, and this could be ascertained only from the contract read in the light of the circumstances under which it was made. The evidence was properly excluded. *Hotchkiss* v. *Higgins*, 52 Conn. 205.

The next question is whether the court erred in holding that the plaintiff did not take the two overdue coupons subject to the arrangement between Henney and the defendant company. It must be conceded that these two coupons are negotiable instruments, and that the plaintiff took them when they were overdue. The fact that these two coupons were overdue would not necessarily affect the plaintiff's title

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to the bonds, nor to the coupons not overdue. 2 Daniel on Neg. Inst. (3d ed.) § 1506 *a*; Tiedeman on Com. Paper, § 473; nor is it claimed that it would do so; the only claim made is that it affected the title of these two coupons. It may be conceded also, as claimed by the defendant, that in taking these two overdue coupons the plaintiff took them subject to all defenses and equities which would have been available to the defendant against Henney. 2 Daniel on Neg. Inst. § 1505; Tiedeman on Com. Paper, § 473. The defenses and equities which would have been thus available, are confined to those which existed and attached to the coupons themselves in the hands of Henney at the time of the transfer, and do not include defenses and equities arising out of collateral transactions. *Simpson* v. *Hall*, 47 Conn. 417. In other words the plaintiff took such title to the overdue coupons as Henney had to convey. "The indorsee of overdue paper takes it as a holder with notice that it is subject to some defense, for he takes it at a time when in due course it should have been paid. He therefore takes it subject to the defense: (1) That it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction, at the time of the indorsement, or that there was some equitable defense arising out of the transaction, in which the paper was given, which disabled his indorser in whole or in part. Any of these defenses is called an equity attaching to the instrument." 1 Daniel, Neg. Inst. § 725 *a*; Tiedeman, Com. Paper, § 295.

The arrangement which is found to have existed between Henney and the defendant is that Henney "was not to present the coupons for payment until it was convenient for it to pay them." The utmost that can be claimed for this is that it was in effect an agreement not to bring suit upon the coupons until it was convenient for the company to pay them; and it admits of grave doubt whether a collateral agreement of this kind, which so directly contradicts the language of the coupon, is not a defense or an equity aris-

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ing out of a collateral transaction, by which the plaintiff would not be affected.

It is not, however, necessary to determine that question here, for we think that upon the facts found it is not shown that the company could have availed itself of this arrangement even as against Henney; and if so the plaintiff cannot be affected by it. It is found that Henney, who was president of the defendant company, "had had an arrangement" of the kind indicated, but it is not found that it was in existence when the coupons were transferred to the plaintiff. For aught that appears it may have ceased to exist long before that time. Then again it is not shown that there was any consideration for the forbearance on Henney's part, or that he was in any way legally or equitably bound to forbear, or to continue his forbearance for any length of time. It is not even shown that there was any contract or agreement at all, with or without consideration, on Henney's part, not to present the coupons for payment. For aught that appears it was merely an understanding or "arrangement" to last during the pleasure of Mr. Henney, and not at all obligatory upon him legally or equitably. Under such circumstances Henney could have brought suit on the coupons, and the "arrangement" would be no defense as against him; and we think it is equally unavailing as against the plaintiff standing in Henney's shoes.

The court allowed interest upon the coupons from the time they were presented for payment, and of this also the defendant complains. It is settled by the current of American authorities that coupon bonds, and coupons, like those in the present case, are negotiable instruments, and that the coupons may be detached and negotiated separately by simple delivery. *Society for Savings* v. *New London*, 29 Conn. 174; *New London City Bank* v. *Ware River R. Co.*, 41 id. 542; 2 Daniel, Neg. Inst. § 1509 *et seq.*; Tiedeman, Com. Paper, §§ 473–478. The coupon may be outstanding and suit brought upon it even after the bond has been paid and satisfied. *National Exchange Bank* v. *Hartford, etc., R. Co.*, 8 R. I. 375. As the coupon may be thus detached from the bond, and by negotiation

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may thus become an independent claim, existing as well before as after the bond is paid, the general rule founded in good sense, and supported by the very great preponderance of authority, is that interest, at least after demand of payment, is allowable upon overdue coupons. Tiedeman, Com. Paper, § 477 and cases cited; 2 Daniel, Neg. Inst. § 1513 and cases cited. "Interest is recoverable upon coupons after their maturity; for being promissory notes, generally speaking, it is just that if not paid when due they should continue to draw interest by way of compensation for the damages incurred from the detention of the money. Interest upon overdue coupons is therefore recoverable and should be computed at the lawful rate without semi-annual or other rests." Freeman's Note to *Morris Canal Co.* v. *Fisher*, 64 Am. Dec. 439, citing a great number of cases; *Whitaker* v. *Hartford, etc., R. Co.*, 8 R. I. 47; *National Exchange Bank* v. *Hartford, etc., R. Co.*, ibid. 375; *Beaver County* v. *Armstrong*, 44 Pa. St. 63; *Trustees, etc.*, v. *Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209. We see no good reason why this almost universal rule as to the allowance of interest upon overdue coupons, especially after demand of payment, should not apply in a case like the one at bar.

The defendant, upon this point, relies upon *Rose* v. *Bridgeport*, 17 Conn. 243. That case was decided at a time (1845) when coupons and coupon bonds, so common to-day in the markets of the world, were just beginning to come into use, and the coupons in that case were quite different from the coupons in the present case. In that case the coupon itself contained no promise to pay the interest mentioned in it. It simply acknowledged that, on a named date, there would be due to the bearer half a year's interest on a certain bond, and that this would be payable on that date. The coupons were signed by an agent of the city—an agent to acknowledge but not to pay. In the case at bar the coupons declare expressly that the company will pay the bearer the interest at a certain bank on a certain day, and they are signed by the treasurer of the company. The decision in *Rose* v. *Bridgeport*, proceeds, in part at least, upon the view taken by the court

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concerning the nature of the coupons in that case. The coupons were not regarded as conferring any right of action at all upon the holder; they were mere certificates that a half year's interest would be due on the bond at the date specified; and although payable to bearer, they were held to operate "only as an order or letter from the obligee, requesting the interest upon the bond to be paid to another." The only obligation to pay interest was held to arise from the bond alone, and not from the coupons, and the action was regarded as an action upon the bond. Viewing the coupons in this light, the court regarded the action as one brought upon the bond to recover interest, as such, upon interest, that is compound interest, as such, and held that as the case then before it did not fall within any of the classes of cases in which compound interest was recoverable, the plaintiff was not entitled to compound interest.

The principles applied in that case have little or no application to a case like the present. The coupons in this case are regarded by the law as negotiable instruments, and for most purposes as being entirely independent of the bond, and as conferring a right upon the holder, whoever he may be, to the sum of money mentioned in the coupon at the very day therein specified. Cases like this seem to fall, and to have been intended by the parties to fall, within the principle of the third rule laid down by JUDGE SWIFT in *Selleck* v. *French*, 1 Conn. 32, 33, rather than within the rules applied in *Rose* v. *Bridgeport*. The rule laid down by JUDGE SWIFT is this: "3. Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange." We are not disposed to extend the doctrine applied in *Rose* v. *Bridgeport* to cases like the present. We are of opinion that the interest on the overdue coupons was properly allowed.

There is no error.

In this opinion the other judges concurred.

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EUGENE CURNANE *vs.* JOSEPH SCHEIDEL.

First Judicial District, Hartford, October Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action of replevin tried upon the general issue, the plaintiff sought to recover the possession of a horse which he claimed belonged to him and had been traded off without his permission by his father-in-law, *S*, to the defendant. *Held* that evidence that *S* had, upon the plaintiff's suggestion, procured a writ and complaint against the defendant for fraud in making the trade, in which *S* was described as plaintiff and owner of the horse, and which had been read to the defendant by the officer, was admissible, either for the purpose of discrediting the plaintiff's claim of title, or, in connection with other evidence, to show a ratification by the plaintiff of the trade made by *S* with the defendant.

The trial court ruled that upon the facts found the plaintiff ratified or affirmed the acts of *S* in trading horses. *Held* that this ruling was fully justified by the facts disclosed upon the record.

[Argued October 6th—decided November 30th, 1897.]

ACTION of replevin to recover the possession of a horse, brought to the Court of Common Pleas in Hartford County and tried to the court, *Peck, Associate Judge;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The material facts are as follows: The plaintiff, who was the owner of the bay horse described in the complaint, had for several years permitted his father-in-law, Jeremiah Sullivan, who resided in Burlington in this State, to keep and use it on his farm with his own horses. The plaintiff during this time made his home with said Sullivan, though he only occasionally visited Burlington, passing most of his time in Boston where he was in business. In the early part of February, 1897, Sullivan exchanged the horse in question with the defendant for a black horse and $35. Defendant did not know that Sullivan was not the owner of the horse he so traded. Plaintiff's horse was worth from $100 to $150, and

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the black horse about $50. On returning home the following evening, and having learned from Sullivan of the trade, and he and Sullivan having discovered that the horse received from the defendant was blind, the plaintiff was dissatisfied, and told Sullivan he must "fix it up" with the defendant. A few days later plaintiff went to defendant's home to ascertain if he still had the bay horse, and talked with the defendant about the horse, saying it was a good horse; but did not tell defendant that he, the plaintiff, owned it, nor in any manner disavow the trade.

Sullivan afterward went to the defendant and complained that he had "stuck him," and asked him to trade back, which the defendant refused to do; and on the 19th of February, at the plaintiff's suggestion, Sullivan caused a writ and complaint to be drawn against the defendant and placed in the hands of an officer for service, in which Sullivan was described as the plaintiff and as the owner of the bay horse, and which alleged that he had been induced to trade by fraudulent representations, and demanded $200 damages.

The plaintiff Curnane was present at a conversation with the officer about serving the writ, and accompanied the officer part way to defendant's house. The officer did not serve the writ, but told defendant its nature and advised him to settle the matter; and the plaintiff, Curnane, was present at a conversation at Sullivan's house where the officer and the defendant had gone, and in which conversation defendant offered to trade back the horse for $10, but Curnane said nothing about owning the horse.

The plaintiff and Sullivan afterwards together demanded of the defendant the $35 to be paid by defendant, and on defendant's claiming that it was not to be paid until March 15th, Curnane urged defendant to pay the money at once, saying: "Give him the $35 and it will be all right;" and that Sullivan wanted the money to buy another horse.

On the 26th of February the plaintiff commenced the present action, and at the time of service of the writ brought back to the defendant the black horse, which defendant refused to receive. Previous to the service of the replevin writ plain-

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tiff made no demand upon defendant for the horse, nor had either he or Sullivan informed the defendant, nor had the defendant any knowledge, that the plaintiff owned the horse. On March 15th the defendant tendered to Sullivan the $35, which the latter refused to receive, saying that defendant owed him nothing.

During the trial the defendant offered deputy sheriff Morse as a witness, and asked: "Did you have a writ in your possession in which Sullivan was plaintiff and Scheidel was defendant, with which you went to Scheidel's house, and which you read to him?" To this question the plaintiff objected, on the ground that it was immaterial and irrelevant. Prior to this both Curnane and Sullivan had testified that Curnane owned the horse (which was a controverted question in the case), and also that Sullivan procured the writ in question, and that Curnane knew of the existence and intended service of the writ. The court admitted the question as tending to contradict Sullivan's testimony that the horse belonged to Curnane, and also as tending, in connection with the other evidence, to show a ratification by Curnane of Sullivan's act in trading the horse. To the admission of this question the plaintiff excepted. The answer was: "I did. I read it in part, and told him what the rest was." Morse produced the writ, and the defendant offered it in evidence. The same objection and ruling were made, and the plaintiff excepted to the admission of the writ. This was the writ procured by Sullivan at the suggestion of the plaintiff, before referred to.

Upon the above facts the plaintiff claimed that the title and right of possession was in the plaintiff, and that he was entitled to judgment in his favor; but the court held that the acts of the plaintiff and his failure to disavow Sullivan's trade of the horse, or to assert his title, constituted a ratification by him of Sullivan's act in trading the horse, and rendered judgment for the defendant.

Roger S. Newell, for the appellant (plaintiff).

Upon the facts found the trial court erred in holding that the plaintiff had ratified the act of Sullivan in disposing of

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the horse; and also erred in admitting in evidence the writ in which Sullivan was described as plaintiff. *Ellison* v. *Jackson Water Co.*, 12 Cal. 542; *Dunn* v. *Hartford & W. H. R. Co.*, 43 Conn. 434; *Hammerslough* v. *Cheatham*, 84 Mo. 13; *Hamlin* v. *Sears*, 82 N. Y. 327; *Workman* v. *Wright*, 33 Ohio St. 405; *Shominger* v. *Peabody*, 57 Conn. 46; *Whittemore* v. *Hamilton*, 51 id. 153.

George E. Taft, for the appellee (defendant).

"When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed." 2 Kent's Comm. 616. On three occasions subsequent to the trade, and prior to the bringing of this action, the plaintiff was present when the matter of the trade was discussed by Sullivan and the defendant. On none of these occasions did he disavow the trade or assert his ownership to the horse in question, which silence on his part, when so apt an opportunity was given him to speak, and when it was his duty to speak, was a confirmation of the trade. *Heath* v. *Taylor*, 10 N. H. 538; *Johnson* v. *Jones*, 4 Barb. 369. The evidence of deputy sheriff Morse was properly received. *Searing* v. *Butler*, 69 Ill. 575; *Cairncross* v. *Lorimer*, 7 Jur. N. S. 149; *Trusdale* v. *Ward*, 24 Mich. 117; *Hayne* v. *O'Hagen*, 60 id. 150.

HALL, J. Under the answer of a general denial the plaintiff was required to prove his title to the horse described in the complaint, or his right of immediate possession. General Statutes, § 1330; *McNamara* v. *Lyon*, 69 Conn. 447.

To establish such ownership both he and Sullivan testified that the horse belonged to the plaintiff. For the purpose of discrediting these witnesses, as well as to show a ratification by the plaintiff of the sale made by Sullivan, the evidence offered by the defendant, that with the knowledge and at the suggestion of the plaintiff Sullivan had procured the complaint for fraud to be drawn in which he was himself described as plaintiff and as the owner of the horse, and that the officer

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had read it to the defendant, was properly received. This evidence strongly indicated, either that the testimony of the plaintiff and Sullivan that the former was the owner of the horse, was not true, or that the plaintiff had adopted the contract of exchange made by Sullivan.

The facts found by the court were sufficient to constitute a ratification by the plaintiff of the sale made by Sullivan. The following definition of ratification given by ANDREWS, C. J., in delivering the opinion of this court in the case of *Ansonia* v. *Cooper*, 64 Conn. 536, 544, is especially applicable to the case before us: "Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification."

The plaintiff learned from Sullivan himself all the circumstances of the exchange the day after it was made. He was dissatisfied with the results of Sullivan's bargain, but he expressed, even to him, no disapproval of his assumption of authority to make it. Until the commencement of this action the plaintiff had not only failed by any act or word to disapprove Sullivan's authority or to repudiate his contract, but he had both by language and conduct expressed his acquiescence in Sullivan's action and his intention to adopt the trade which Sullivan had made. When he learned that the horse which Sullivan had received was blind, he directed him to "fix it up" with the defendant. In conversation with the defendant about the horse Sullivan had sold him, he neither disaffirmed the trade, nor denied Sullivan's ownership, but told the defendant it would be all right if he would pay Sullivan the "boot" money. He permitted, if he did not authorize, the institution of the action for damages against the defendant, in which Sullivan was plaintiff and in which he was alleged to be the owner of the horse sold to the defend-

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ant. The commencement of this action at the direction of the plaintiff, or with his approval, based upon Sullivan's authority to make the exchange, was a positive affirmance of Sullivan's contract. *Shoninger* v. *Peabody*, 57 Conn. 42.

There is no finding that Sullivan intended to defraud the plaintiff, nor that he did not suppose he was authorized to make the exchange.

We think the relations of Sullivan and the plaintiff, as shown by the facts found, were such as permitted the plaintiff to adopt his act.

There is no error.

In this opinion the other judges concurred.

HENRY L. GOODWIN *vs.* THE TOWN OF EAST HARTFORD ET AL.

First Judicial District, Hartford, October Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A town treasurer cannot bind the town by his acceptance of an illegal town order.

By Chap. 126 of the Public Acts of 1887, p. 746, the first selectmen of the five towns which were found to be specially benefited by the layout and establishment of a public highway across the Connecticut River at Hartford, and which were thereafter chargeable with its support, were constituted a board "for the care, maintenance and control of said highway," and for that purpose became "a body politic and corporate." *Held* that the expenses which this board could lawfully incur and impose upon the several towns were limited to those for the repair and maintenance of the highway; and that the towns were not liable for expenses incurred by the board for securing legislation whereby its own corporate existence was terminated and the burden of maintaining the highway was transferred to the State.

There can be no ratification of an unauthorized act, unless all the facts are known and an intent to ratify exists.

In the case at bar the plaintiff alleged that the defendant town and its treasurer intended to pay certain illegal orders drawn against the

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latter by said highway board; and the answer averred that several annual reports of the selectmen, treasurer and other town officials, containing these orders as a liability of the town, were accepted by the town. *Held* that these allegations did not show a ratification by the town of the acts of the highway board.

A town is not estopped from setting up the illegality of an order drawn upon its town treasurer, merely because it has passed into the hands of a *bona fide* holder. Although such orders may be transferable by delivery or indorsement, they do not possess the full characteristics of commercial paper,—freedom from all legal and equitable defenses in the hands of a *bona fide* holder.

[Argued October 6th—decided November 30th, 1897.]

SUIT to enjoin the town of East Hartford and its treasurer from paying certain orders drawn upon the latter by the chairman of the highway and bridge commission, brought to the Superior Court in Hartford County and tried to the court, *Elmer, J.*, upon the plaintiff's demurrer to the defendants' answer; the court sustained the demurrer and, no further plea or answer being filed, rendered judgment for the plaintiff, and the defendants appealed for alleged errors in the rulings of the court. *No error.*

The amended complaint is as follows:—

"1. That he (the plaintiff) is, and for many years has been, an inhabitant and elector of said town of East Hartford, and is and for many years has been the owner of real and personal estate situated within the limits of said town of East Hartford, and is liable to the payment of such taxes as may be legally imposed upon his said property by said town of East Hartford, and has heretofore been assessed and taxed thereon by said town. 2. That the General Assembly of the State of Connecticut at its January Session, A. D. 1887, passed an Act, which was duly approved by the Governor of said State, May 19th, 1887, to establish free public highways across the Connecticut river in Hartford county, which Act provided for the assessment of the damages caused by the layout and establishment of such free highways, upon the several towns specially benefited by the layout and establishment of said highways, as benefits accruing to said several towns; that the towns so assessed should, after the establishment of such free

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public highways, maintain the same in proportion to the assessment upon said towns for the establishment of said highways; constituted the first selectmen of said towns so assessed a body politic and corporate by the name of 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' for the purpose of caring for and maintaining and controlling said highways, and defined the powers and duties of said corporation. . . . 3. That the Act of the General Assembly mentioned in paragraph 2, provided that the said 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' should appoint a chairman, secretary, and treasurer, and should apportion the expense of repairing and maintaining said free public highways, upon the several towns benefited by their layout and establishment, in proportion to the assessment against said towns for the damages caused by the layout and establishment of said free public highways, and that the chairman of said board should draw his order on the treasurers of the said towns payable to the order of the treasurer of said board, for the proportional amount payable by the said towns for such repairs and maintenance; and provided further that damages resulting from the defective condition of said free public highways or the bridges thereon, should be assessed in the same manner. 4. That pursuant to the provisions of the Act of the General Assembly, upon the complaint of the State's Attorney for Hartford county, the Superior Court for said county subsequently, to wit, at its October term, 1888, laid out and established a free public highway across the Connecticut river in Hartford county, in the limits of the towns of Hartford and East Hartford in said county, said free public highway being laid out where the toll bridge of the Hartford Bridge Company across the Connecticut river then was, and along the causeways and approaches appurtenant to and connected therewith. 5. That the said Superior Court for Hartford county in its judgment or decree laying out and establishing said free public highway, assessed the expenses thereof upon the towns of Hartford, East Hartford, Glastonbury, South Windsor and Manchester,

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having found said towns to be especially benefited by said layout; and the proportion of said expense imposed by said court upon the said town of East Hartford was eleven thirty-fifths of the entire expense; the sum of $67,000 being by said Superior Court assessed upon the town of East Hartford, and the entire expense being found by said court to be $210,000. 6. That by the provisions of said Act of the General Assembly providing for the layout and establishment of said free public highway, the said town of East Hartford became and was liable to pay in the manner prescribed by said Act, eleven thirty-fifths of the expense of repairing and maintaining said free public highway; and eleven thirty-fifths of any damage resulting from the defective condition of said free public highway or the bridges thereon, and for no other expense whatever. 7. That on the 23d day of September, A. D. 1889, the first selectmen of said towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester, met pursuant to the provisions of the aforesaid Act of the General Assembly, and organized the corporation by said Act directed to be organized, by the name of 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County;' and said corporation so organized immediately assumed the care and control of said free public highway, repairing and maintaining the same from that time until June 29th, 1893. 8. That on June 29th, 1893, George W. Fowler was, and for a long time prior thereto had been, first selectman of said town of Hartford, and a member of and chairman of the said 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' and John S. Risley was, and for a long time prior thereto had been, first selectman of said town of Manchester, and a member of and the treasurer of the said corporation. 9. That pursuant to the provisions of the said Act of the General Assembly providing for the creation of said corporation and defining its powers, the chairman of the said corporation was empowered to draw his orders in favor of the treasurer of said corporation, upon the treasurer of the town of East Hartford, for eleven thirty-

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fifths of the expense of repairing and maintaining said free public highway, and also for eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, and for no other expenditure or purpose whatever. 10. That the State of Connecticut, by virtue of the provision of an Act of the General Assembly, at its January session, 1893, approved June 29th, 1893, and which Act, by force of another Act of said General Assembly, was made to take effect from its passage, assumed the duty of repairing and maintaining the said free public highway on said June 29th, 1893. 11. That the entire expense of repairing and maintaining the said free public highway from the 5th day of October, 1892, to the 29th day of June, 1893, including all damages resulting from the defective condition of said free public highway, was the sum of $5,333.90, and of that sum, eleven thirty-fifths, or the sum of $1,676.37, was the proportion chargeable to said town of East Hartford. . . . 12. That on said 29th day of June, A. D. 1893, the said George W. Fowler, as chairman of said corporation, without any authority of law, and in disregard of his official duty, wrongfully and unlawfully drew his orders in favor of said John S. Risley, as treasurer of said corporation, upon the treasurer of said town of East Hartford, for the aggregate sum of $10,962.26, being eleven thirty-fifths of the sum of $34,879.94, which said sum was falsely pretended by said Fowler and by said corporation to have been expended for legal services, and was falsely so entered in the account of said John S. Risley as treasurer of said corporation, and said sum of $10,962.26 was in addition to the sum lawfully assessed against said town of East Hartford, as set out in paragraph 11. 13. That 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' was not indebted for, on October 5th, 1892, and between October 5th, 1892 and June 29th, 1893, did not expend for any legal services rendered said corporation which said corporation might lawfully contract for, pursuant to the powers granted to it by the General Assembly, said sum of $34,879.94, or any part of said sum. 13*a*. That at the date of said orders to the amount of

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$10,962.26, so illegally drawn upon the treasurer of said town of East Hartford as aforesaid, nothing whatever was due and payable to 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' from the said town of East Hartford, as the proportional amount payable by said town for the expenses of repairing and maintaining the free public highway aforesaid, and of any damages resulting from the defective condition of said highway or of the bridges thereon. 15. That on said 29th day of June, A. D. 1893, the defendant Charles Merriman was, ever since has been, and now is, treasurer of said town of East Hartford. 16. That on the 30th day of June, A. D. 1893, the said town of East Hartford, and the said Merriman as treasurer of said town, paid to said John S. Risley, as treasurer of the said corporation, unlawfully and in violation of the rights of the plaintiff and of the other inhabitants and taxpayers of said town of East Hartford, the sum of $5,962.26, being part of said illegal orders so illegally drawn as aforesaid for said sum of $10,962.26, and on said day the said Merriman, as treasurer of said town of East Hartford, unlawfully and in like violation of the rights of the plaintiff, undertook to accept and, so far as said illegal act had any effect, did accept in the name of said town of East Hartford and agreed to pay from the treasury thereof, four of said illegal orders, to wit: two of said illegal orders, each for the sum of $1,500, and two other illegal orders, each for the sum of $1,000, amounting in all to the sum of $5,000, which four said orders are still outstanding and unpaid. 17. That on the 30th day of June, A. D. 1893, when said illegal payment was made of said illegal orders to the amount of $5,962.26 by the defendants, said town of East Hartford and said Merriman as treasurer, there was in the hands of the defendant Merriman, as treasurer of said town, money belonging to the said town of East Hartford, raised by taxation, of which the plaintiff had paid a part, or money raised upon the credit of said town of East Hartford for which the plaintiff was liable to be taxed and in which he was interested as an inhabitant, elector, and taxpayer of said town, and

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said illegal orders of the amount last above mentioned were unlawfully paid from said money so raised as aforesaid, and the plaintiff was thereby wrongfully injured and affected and greatly damaged. 18. That said defendants, the said town of East Hartford and the said Merriman as treasurer of said town of East Hartford, intend to pay the said four illegal orders amounting to the sum of $5,000, now outstanding and unpaid, as hereinbefore set forth, out of money belonging to said town of East Hartford, now in the hands of the defendant Merriman as treasurer of said town, or hereafter to be paid into his hands as such treasurer, raised or to be raised by taxation, of which the plaintiff has paid or will be compelled hereafter to pay a part, or out of money raised or to be raised upon the credit of said town and now paid, or hereafter to be paid into the hands of the defendant Merriman as treasurer of said town, for which the plaintiff is liable to be taxed, and in which he is interested as an inhabitant, elector and taxpayer of said town of East Hartford. 18*a*. That if the said defendants pay the amount of said four illegal orders aforesaid out of said money of said town of East Hartford, raised or to be raised as aforesaid, the plaintiff will be wrongfully affected and injured and greatly damaged. 19. That the plaintiff is apprehensive and believes that said defendants are about to pay said four illegal orders amounting to said sum of $5,000, at an early date, and will do so to the great injury and damage of the plaintiff and the other inhabitants and taxpayers of said town of East Hartford, unless they are restrained by injunction, and that the plaintiff has no adequate remedy at law. 20. That on the day of July, 1893, two of the illegal orders described as outstanding and unpaid in paragraph 16, each bearing the indorsement in blank of John S. Risley as treasurer, as aforesaid, one being for the sum of $1,500, and the other for the sum of $1,000, came into possession of Benjamin Wells of said town of East Hartford, who ever since has held and now holds said two illegal orders, and claims to be the owner thereof. 21. That on the day of July, 1893, the remaining two of said outstanding and unpaid illegal orders de-

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scribed in paragraph 16, one for the sum of $1,500, and the other for the sum of $1,000, each bearing the indorsement in blank of said John S. Risley as treasurer, as aforesaid, came into the hands of Eunice Cowles of the town of Hartford, who ever since has held and now holds said two illegal orders and claims to be the owner thereof. 22. That said Benjamin Wells and Eunice Cowles are interested in the determination of this action, and are made parties defendant.

"The plaintiff claims: (1) an injunction restraining and enjoining the defendants, the said town of East Hartford, and the said Charles Merriman, as he is treasurer of said town of East Hartford, and his successors in office and each of them, from paying said four illegal orders, amounting in all to the sum of $5,000, and any of them and any part of said sum of $5,000; (2) such other and further relief in the premises as may to equity appertain."

The answer of the defendants was as follows:—

"Paragraph 1. The defendants admit paragraphs 1, 4, 5, 7, 8, 10, 15, and 22 of plaintiff's amended complaint. Par. 2. In respect to paragraphs 2 and 3 of said amended complaint, the defendants admit that the General Assembly of the State of Connecticut, at its January session, 1887, passed an Act duly approved by the Governor, May 19th, 1887, and which took effect upon its passage, which Act was entitled 'The Act to Establish Free Public Highways across the Connecticut River in Hartford County,' and being chapter 126 of the Public Acts of 1887, which said Act is the Act referred to in said paragraphs 2 and 3 of the amended complaint, and is hereby referred to and made a part of this defense as fully as if it and all its provisions were incorporated herein. Par. 3. In respect to paragraph 5 of the amended complaint the defendants admit the rendition of the judgment or decree referred to in paragraph 5, and said judgment or decree and the proceedings in said court resulting in said judgment or decree are hereby made a part of this defense. Par. 4. In respect to paragraph 6 of said amended complaint the defendants admit that by the provisions of said Act the town of East Hartford became liable to pay eleven thirty-fifths of the ex-

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pense of repairing and maintaining said free public highway, and eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, or the bridges thereon, and deny the rest of said paragraph 6. Par 5. In respect to paragraph 9 of the amended complaint the defendants admit that, pursuant to the provisions of said Act of the General Assembly, the chairman of said corporation was empowered to draw his order in favor of the treasurer of said corporation upon the treasurer of the town of East Hartford for eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and also for eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, and deny the rest of said paragraph 9. Par. 6. Paragraph 11 of the amended complaint is denied. Par. 7. In respect to paragraph 12 of the amended complaint the defendants admit that on the 29th of June, 1893, the said George W. Fowler, as such chairman, drew orders in favor of said John S. Risley, as treasurer of said corporation, upon the treasury of the town of East Hartford for the aggregate sum of $10,962.20, which sum, mathematically considered, is admitted to be, for the purpose of this case, eleven thirty-fifths of the sum of $35,879.94; and the defendants deny the rest of said paragraph 12 of said amended complaint. Par. 8. Paragraphs 13 and 13*a* of the amended complaint are denied. Par. 9. In respect to paragraph 16 of said amended complaint defendants admit that on the 30th day of June, 1893, the said town of East Hartford and the said Merriman, as treasurer of said town, paid to said John S. Risley, as treasurer of said corporation, the sum of $5,962.25, being part of said orders drawn as aforesaid for said sum of $10,962.20; and that on said day the said Merriman, as treasurer of said town of East Hartford, undertook to, and did, accept, in the name of said town of East Hartford, and agreed to pay from the treasury thereof, four of said orders, to wit, two of said orders, each for the sum of $1,500, and two other of said orders, each for the sum of $1,000, amounting, in all, to the sum of $5,000, which four said orders are still outstanding and unpaid; and the defendants

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deny the rest of said paragraph 16 of said amended complaint. Par. 10. In respect to paragraph 17 defendants admit that on the 30th day of June, 1893, when said payment of said orders to the amount of $5,962.20 was made by the defendants, said town of East Hartford and said Merriman as treasurer, there was in the hands of the defendant Merriman, as treasurer of said town, money belonging to the town of East Hartford and raised by taxation, or money raised upon the credit of the said town of East Hartford, for which the plaintiff was liable to be taxed, and in which he was interested as an inhabitant, elector, and taxpayer of said town; and defendants deny the rest of said paragraph 17. Par. 11. In respect to paragraph 18 of the amended complaint the defendants admit that the town of East Hartford and said Merriman as treasurer of said town, intend to pay said four orders, amounting to the sum of $5,000, now outstanding and unpaid, as aforesaid, out of money belonging to said town of East Hartford now in the hands of the treasurer of said town, or hereafter to be paid into his hands, raised, or to be raised by taxation, of which the plaintiff has paid, or will be compelled to pay, a part, or out of money raised, or to be raised, upon the credit of said town, and now paid, or hereafter to be paid, into the hands of the defendant Merriman, as treasurer of said town, for which the plaintiff is liable to be taxed, and in which he is interested as an inhabitant, elector and taxpayer of said town of East Hartford; and defendants deny the rest of said paragraph 18 of the amended complaint. Par. 12. The defendants deny paragraph 18*a* of the amended complaint. Par. 13. In respect to paragraph 19 of the amended complaint the defendants admit that the plaintiff believes that the defendants are about to pay said four orders, amounting to said sum of $5,000, at an early date; and the defendants deny the rest of said paragraph 19 of the amended complaint. Par. 14. In respect to paragraph 20 of the amended complaint the defendants admit that on or before the day of July, 1893, two of the said orders so outstanding and unpaid, and each bearing the indorsement in blank of said John S. Risley, as treasurer, as aforesaid, one for the sum of $1,500, and the other for the

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sum of $1,000, came into the possession of defendant Wells, who ever since has held, and now holds, said two orders, and claims to be the owner thereof; and the defendants deny so much of paragraph 20 as alleges that said orders, or either of them, were illegal. Par. 15. The defendants deny so much of paragraph 21 of said amended complaint as alleges that the orders therein referred to were illegal, and admits all the rest of paragraph 21. Par. 16. The said orders were in the form following, the amount being omitted: 'No. 7D. Hartford, June 29, 1893. *To the Treasurer of the Town of East Hartford:* Pay to the order of John E. Risley, Treas., dollars, and charge the same to the account of the Board for the Care of Highways and Bridges across the Connecticut River in Hartford County. G. W. Fowler, *Chairman.*' They were indorsed in blank upon the back, 'John S. Risley, Treas.' They were also indorsed by the treasurer of the defendant town across the front, 'Accepted with 5% interest. Chas. Merriman, Treas. June 29/93,' and were so accepted, as per said indorsement by said treasurer on said date. Par. 17. Afterwards, and on the day of July, 1893, the defendants Benjamin Wells and Eunice Cowles, purchased in open market of the then holders thereof, for full value, in good faith, and without notice of any defect, said orders, and now hold the same, wholly unpaid and unsatisfied. Par. 18. In the annual report of the selectmen and treasurer and other officers of said town of East Hartford to the town of East Hartford, in the year ending September 11th, 1896, and in other such reports, there was contained, as a liability, a statement that said orders were still outstanding as an immediate liability to the amount of $5,000, bearing interest at the rate of 5 per cent, and said report, with said statement of said orders as liabilities, was accepted by said town of East Hartford. Par. 19. The said orders were made, accepted, indorsed and negotiated in payment for services of persons employed and expenses incurred by the first selectman and town agent of the defendant town, and by said 'Board for the care of Highways and Bridges across the Connecticut River in Hartford County,' to relieve and absolve the defendant town from obli-

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gation and liability respecting the said highway and bridge, and the care, repair and maintenance thereof; and said services and expenses were, in part, rendered and expended in respect to the preparation of the Act of the General Assembly referred to in the 10th paragraph of the amended complaint, and in respect to the proceedings before the committee of the General Assembly in respect to said legislation."

To the foregoing answer the plaintiff demurred, as follows:—

"The plaintiff demurs to the defendants' amended answer, and particularly to paragraphs 16, 17, 18 and 19 of the defendants' amended answer.

"*First.* Because 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County' had no power or authority to employ persons or incur expenses to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair and maintenance thereof; and no power or authority to draw orders, or cause orders to be drawn, upon the treasurer of the defendant town to the order of John S. Risley, treasurer of said board, in payment for the services of persons employed and expenses incurred for said purposes. *Second.* Because George W. Fowler, chairman of said board, had no power or authority to draw orders upon the treasurer of the defendant town to the order of John S. Risley, treasurer of said board, in payment of persons employed and expenses incurred to relieve and absolve the defendant town from obligation and liability respecting said highway and bridge, and the care, repair and maintenance thereof, whether said persons were employed and said expenses were incurred by said board or by the first selectman and town agent of the defendant town, or by said board and said first selectman and town agent acting jointly. *Third.* Because John S. Risley, the treasurer of said board, had no power or authority to indorse and negotiate any orders drawn by said George W. Fowler, as chairman of said board, in payment for services of persons employed and expenses incurred by said board, or by the first selectman and town agent of the defendant town, or by said board and said first selectman and town agent jointly,

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to relieve and absolve the defendant town from liability and obligation respecting said highway and bridge, and the care, repair and maintenance thereof. *Fourth.* Because the first selectman and town agent of the defendant town had no power or authority, either alone or acting jointly with said board, to employ persons or incur expenses to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair and maintenance thereof; and it is not alleged that defendant town appointed an agent for such purpose. *Fifth.* Because the defendant Merriman, as treasurer of the defendant town, had no power or authority to accept with five per cent. interest, in behalf of the defendant town, any orders drawn upon him, as said treasurer, by George W. Fowler, as chairman of said board, to the order of said John S. Risley, as treasurer of said board, in payment for services of persons employed or expenses incurred by said board or by the first selectman and town agent of the defendant town, to absolve and relieve the defendant town from obligation and liability respecting said highway, and the care, repair and maintenance thereof. *Sixth.* Because the defendant Merriman, as treasurer of the defendant town, had no power or authority to accept with five per cent. interest, in behalf of the defendant town, any orders drawn upon him as such treasurer, by George W. Fowler, as chairman of said board, to the order of said John S. Risley, as treasurer of said board. *Seventh.* Because the defendants, Benjamin Wells and Eunice Cowles, the purchasers and holders of said orders, were bound to take notice of the scope and measure of the powers of the defendant Charles Merriman, as the treasurer of the defendant town, and to take notice of his want of power and authority to bind the defendant town by his acceptance in its behalf, with five per cent. interest, of any orders of George W. Fowler, chairman of said board, upon said defendant Merriman, as treasurer of defendant town, to the order of John S. Risley, as treasurer of said board. *Eighth.* Because the defendants Benjamin Wells and Eunice Cowles were bound to take notice of the lawful powers and duties of said board, and of the lawful powers and duties of

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its chairman and its treasurer, and to take notice that the chairman of said board had no power to draw orders to the order of its treasurer upon the defendant Merriman, as treasurer of the defendant, for any purposes save those specified in the Act of the General Assembly creating said board, and were bound at their peril to enquire whether the orders they purchased were or were not drawn by said George W. Fowler, as chairman, and indorsed by said John S. Risley, as treasurer, for the purposes specified in said legislative Act. *Ninth.* Because the orders held by said defendants Benjamin Wells and Eunice Cowles were and are void, for want of power in the said board and in the first selectman and town agent of defendant town to employ persons and incur expenses for the purposes specified in paragraph 19 of the amended answer, and for want of power in the said George W. Fowler, as chairman of said board, to draw said orders for the purposes specified in paragraph 19 of the amended answer; and likewise for want of power in said John S. Risley, as treasurer of said board, to indorse and negotiate the same, and for want of power in the defendant Merriman, as treasurer of said defendant town, to accept the same with five per cent. interest on behalf of defendant town. *Tenth.* Because it is not alleged in paragraph 18 of said amended answer that the warning of the town meeting of the defendant town which accepted the reports of the town officers mentioned in said paragraph for the year ending September 11th, 1896, or the warning of any town meeting which accepted any like reports, contained any notice that any unauthorized act or acts of the first selectman and town agent, or of the town treasurer of the defendant town, would be brought before such town meeting for ratification. *Eleventh.* Because there is no allegation in said paragraph 18 that any unauthorized act of the first selectman and town agent, or of the treasurer of the defendant town, was, in fact, submitted for ratification to any town meeting of the defendant town with a statement of the material facts, so that the defendant town might take lawful action in the premises. *Twelfth.* Because the facts alleged in said paragraph 18 are wholly insufficient in the law to constitute a

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ratification on the part of the defendant town, of the unauthorized acts of the defendant Merriman, as treasurer of the defendant town, in accepting with five per cent. interest the orders purchased and held by the defendants Wells and Cowles, as set out in paragraph 16 of the amended answer, and of the unauthorized acts of the first selectman and town agent of defendant town in employing persons and incurring expenses for the purposes set out in paragraph 19 of the amended answer. *Thirteenth.* Because the defendant town had no power to employ persons or incur expenses to relieve and absolve it from liability and obligation respecting the said highway, and the care, repair and maintenance thereof, a duty imposed on the defendant town by the State of Connecticut, and no power to ratify any unauthorized acts of its officers or agents in employing persons or incurring expenses for such purposes."

Henry Stoddard, with whom was *William C. Case*, for the appellants (defendants).

This case is controlled by the principles of law involved in the very recent cases of *Farrell* v. *Derby*, 58 Conn. 234, and *Dibble* v. *New Haven*, 56 id. 199, 202. Both of these cases proceed upon the principle that in this State the town, in reference to the management of its prudential affairs, may, at its discretion, pay any debt or obligation incurred by any agency, whether authorized primarily or not. The town of East Hartford having received the benefit of the employment and services of the agents and attorneys in question, and intending and desiring to pay the obligation, it is unnecessary to consider whether the town is strictly liable at law upon the orders in question. *Norwalk Gas Light Co.* v. *Norwalk*, 63 Conn. 522; *East Hartford* v. *American Nat. Bank*, 49 id. 553. The defendant town is liable at law upon the orders in question, and is so liable in either of two views of the case. In the first place the orders were drawn in payment of claims arising from the care, maintenance, and repair of the highway in question. It is novel doctrine in Connecticut that a town cannot pay the necessary and legitimate

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expenses connected with obtaining proper legislation in respect to the highways which it is bound to maintain. And, secondly, the authority constituted by law to determine the question has determined that the claims are for the care, maintenance, and repair of the highway. The orders in question are negotiable in character and in the hands of the defendants, Wells and Cowles, who are *bona fide* owners, the town is liable upon the orders. In this State such orders have been treated and regarded to a large extent as negotiable, and have circulated as such. *Bethlehem* v. *Watertown*, 51 Conn. 493. But the orders in question further contain a substantial recital of fact upon which the purchaser in the open market is entitled to rely. *Andes* v. *Ely*, 158 U. S. 324; 2 Dan'l on Neg. Instr. (3d ed.), 537, 538. The application to the legislature of 1893, and obtaining the repealing Act of that year, was not an unlawful act, and the Superior Court erred in ruling that it was. It is neither resistance to, nor an attack upon, the sovereignty of the State of Connecticut. The cases cited by the plaintiff to support his contention are not in point. Cases in which the town had no duty, and no right in respect to the subject-matter in question, have no application to the case at bar.

Francis H. Parker, for the appellee (plaintiff).

The orders in question, drawn for the purposes set out in paragraph 19 of the answer, were *ultra vires* and void. These orders were not drawn for the expenses of repairs and maintenance, nor were they drawn in payment of damages arising from defects. The defendant town had no greater power to do the acts set out in the answer than the bridge board had. Section 7 of the Bridge Act of 1887 imposes upon the town the duty of paying orders drawn for lawful purposes, and no statute authorizes the town to pay any orders drawn for other purposes. The act of one selectman, even if he be first selectman, is ineffectual. He cannot bind the town. The addition of the words "town agent," is immaterial. There is no such officer, and no statute prescribing the duties of such an officer. Again, the treasurer of the

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town had no power to accept the orders in question, with interest at 5 per cent, or in any form. A town treasurer cannot bind his town by making or accepting commercial paper of any kind, nor has he any power to accept town orders. His powers are strictly limited by statute, and he has no power to pay any illegal demand upon the town. Gen. Stat. §§ 84, 85, 86; *East Hartford* v. *Amer. Nat. Bank*, 49 Conn. 552, 553; *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U. S. 121; *Lowell Savings Bank* v. *Winchester*, 8 Allen, 114; *Smith* v. *Cheshire*, 13 Gray, 318; *Railroad Savings Bank* v. *Lowell*, 109 Mass. 214; *Agawam Bank* v. *South Hadley*, 128 id. 506. The cases of *Farrell* v. *Derby*, 58 Conn. 234, and of *Dibble* v. *New Haven*, 56 id. 199, are not in point. Here the public corporations are not defending their corporate rights against the aggressions of interested parties. They are the aggressors in a movement against the sovereignty of the State, and if they could not resist the State, they certainly could not attack it. There can be no ratification by mere implication; it must be by direct action, and with a full understanding of the facts. Here there is nothing to show such understanding or any intent on the part of the town to ratify any *ultra vires* acts of its officers. Gen. Stats. §§ 33, 64, 84, 85, 86; *Turney* v. *Bridgeport*, 55 Conn. 418; *Brooklyn Trust Co.* v. *Hebron*, 51 id. 29; *Dibble* v. *New Haven*, 56 id. 202; *Pinney* v. *Brown*, 60 id. 168, 169, and cases cited. But if the orders in question were *ultra vires* and void, then they were incapable of ratification by the defendant town. 1 Dill. on Mun. Corp. § 463. The defendants, Wells and Cowles, are not entitled to the immunities of *bona fide* holders of negotiable commercial paper. 1 Beach on Pub. Corp. §§ 242, 243; *Ladd* v. *Franklin*, 37 Conn. 62; *East Hartford* v. *Amer. Nat. Bk.*, 49 id. 552, 553; *Turney* v. *Bridgeport*, *supra*; *Barnet* v. *Denison*, 145 U. S. 135 and cases cited. The orders or warrants of public corporations have not the same qualities as ordinary negotiable commercial paper, in respect to privileges of *bona fide* holders. *Wall* v. *Monroe County*, 103 U. S. 78; *Hayes* v. *Holly Springs*, 114 id. 120; *Nashville* v. *Ray*, 86 id. 468 and cases cited; *Claiborne* v. *Brooks*, 111 id. 400; *Con-*

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cord v. *Robinson*, 121 id. 165; *Smith* v. *Cheshire*, 13 Gray, 165. Even *bona fide* holders of the obligations of public corporations cannot recover, if the obligations were *ultra vires*. Dill. on Mun. Corp. §§ 545, 546, 936; Beach on Pub. Corp. §§ 217, 936, 937; *Brenham* v. *German-Amer. Bank*, 144 U. S. 173 and cases cited; *Merchants Exchange Bank* v. *Bergen Co.*, 115 id. 384; *Hayes* v. *Holly Springs*, *supra*; *Ottawa* v. *Carey*, 108 U. S. 110; *Lewis* v. *Shreveport*, ibid. 282; *Marsh* v. *Fulton*, 10 Wall. 676 and cases cited.

ANDREWS, C. J. The plaintiff is a citizen and tax-payer of the town of East Hartford. The judgment of the Superior Court enjoined that town, perpetually, from paying four certain orders of like tenor with the one recited in the sixteenth paragraph of the defendants' answer. If the law is so that the town is, in no event, lawfully under obligation to pay those orders, then the demurrer was properly sustained and the judgment is correct.

It will simplify the discussion if we keep distinctly in mind from the outset, that the town is not liable as the maker or drawer of the orders. An inspection of the order so recited shows that no agent of the town, as such, took part in the making of it. The obligation of the town to pay those orders, if it exists at all, must arise from one of the three, or possibly four, following conditions: First, because the said highway board had authority by law to issue orders for the purpose for which it appears by the record these orders were issued, and so to make them binding on the town; or, second, assuming that the orders were invalid when issued, because the town has ratified them; or third, because the orders were negotiable, and so their validity cannot be questioned in the hands of the present holders. The possible fourth condition is the acceptance of the bonds by the town treasurer. But this may be wholly disregarded. A town treasurer has no authority to bind a town by his acceptance of an illegal order.

Let us, then, first inquire as to the authority of the said board. At its January session in the year 1887, the legisla-

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ture passed an Act entitled, "An Act to establish Free Public Highways across the Connecticut River in Hartford County,"—by subsequent legislation made to apply only to the Hartford Bridge,—by which it was provided that the State's Attorney in Hartford county should bring a complaint to the Superior Court in that county against the proprietors of the said Hartford bridge, then being a toll bridge; that said court, upon such complaint, should appoint commissioners who should lay out and establish a highway across the Connecticut river where the said toll bridge was, and along and across the causeway and approaches appurtenant to and connected therewith, and should appraise the damages and benefits; that "said highway when laid out and established as herein provided, shall be a free public highway;" that said commissioners should determine what towns were specially benefited by the layout and establishment of said highway, and should assess to them such benefits as they should find equitable. The said Act, in its seventh section, then provided that "when said highway, so established as aforesaid, shall have become a free public highway as aforesaid, the same shall thereafter be maintained by the said towns so assessed in proportion to the assessment upon said towns as hereinafter provided. The first selectmen of the said several towns shall meet on the second Monday after said highway shall have become a free highway as aforesaid, at the office of the selectmen in Hartford, and annually thereafter and at such other times as they shall deem necessary, and said several first selectmen shall constitute a board for the care, maintenance, and control of said highway. Said board shall appoint a chairman, secretary, and treasurer, and said board shall apportion the expense of repairing and maintaining said highway upon the said several towns in proportion to the assessment against said towns as aforesaid, and said chairman shall draw his order on the respective treasurers of said towns to the order of the treasurer of said board for the proportional amount payable by said towns as aforesaid for such repairs and maintenance. Any damages resulting from the defective condition of said highway or the bridges upon the

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same shall be paid by said towns in proportion to the said assessment. For the purpose embraced in this section the said board shall be a body politic and corporate by the name of The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County, and actions may be brought against said board by service upon its secretary, and any judgment recovered therein shall be paid by said towns in said proportions and in the same manner as herein provided for the payment of the expenses of repairs and maintenance as aforesaid. Said board shall annually report to said several towns the expenses incurred and paid by them during the preceding year."

Pursuant to the provisions of that Act the State's Attorney for Hartford county brought a complaint to the Superior Court in that county at its October term, 1887, and thereupon commissioners were appointed and such proceedings were had, that said Superior Court by its decree laid out and established a free public highway across the Connecticut River at the place where the toll bridge of the Hartford Bridge Company then was, and along and across the causeways and approaches appurtenant to and connected therewith, and found that the towns of Hartford, East Hartford, Glastonbury, South Windsor and Manchester were especially benefited by said layout, and assessed the benefits to each, the proportion of said expense imposed on the town of East Hartford being eleven thirty-fifths of the entire expense; so that the said town of East Hartford became and was liable to pay in the manner set forth in the said Act, eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and eleven thirty-fifths of any damage resulting from the defective condition of said free public highway or the bridges thereon; and so far as the terms of said Act express, for no other expense whatever.

Afterwards, in September, 1889, the first selectmen of the said towns met, as is provided in said Act, and organized the corporation therein created, by the name of "The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County," by electing George W. Fowler,

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then the first selectman of Hartford, its chairman, and John S. Risley, then the first selectman of Manchester, as its treasurer; and said corporation, so organized, immediately assumed the care and control of said free public highway, repairing and maintaining the same until the 29th day of June, 1893. On said last mentioned day, as it is alleged in the tenth paragraph of the complaint, the General Assembly, being then in session, passed an Act which was made to take effect on its passage, by which the said Act of 1887 was repealed, and the State itself assumed and undertook the duty of repairing and maintaining thereafter the said free public highway. The purposes for which the said orders were issued, is set forth in the nineteenth paragraph of the defendants' answer, as follows:—"The said orders were made, accepted, endorsed, and negotiated in payment for services of persons employed and expenses incurred by said first selectman and town agent of the defendant town, and by said 'Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair, and maintenance thereof; and said services and expenses were, in part, rendered and expended in respect to, and in the preparation of, the Act of the General Assembly referred to in the tenth paragraph of the amended complaint, and in respect to the proceedings before the committee of the General Assembly in respect to said legislation."

We have already seen that the said orders on their face indicate that the first selectman and town agent of the defendant town did not, as such, take any part in the making or drawing of the orders. The first selectman and town agent of the defendant town was a member of said board. He took no part in the making or issuing the orders as such member. If said board might lawfully issue the said orders in the payment of such employment and expenses, and so make them a charge on the town, then the orders should be paid, but otherwise not. And this brings us directly to the question of whether or not the said "Board for the Care of

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Highways and Bridges across the Connecticut River in Hartford County" could lawfully issue these orders for such purposes and make them obligatory on the town of East Hartford.

It has been noticed that the terms of the Act which created the board made it the duty of said board to care for, maintain and control the said highways, and gave it authority to apportion the expense of repairing and maintaining the same, as well as any damages resulting from the defective condition of the said highway and bridge, upon the several towns named in the decree of the Superior Court. The terms of the Act give that board no power to impose on the towns the expense of anything else. The terms of the Act gave that board no authority to employ agents to appear before the legislature, for any purpose whatever; least of all to employ agents to procure legislation which would terminate its own existence. And it seems to us that said board did not have such power by implication.

If we regard the board simply as a device to enable the representatives of the five towns to perform a municipal duty imposed on the town jointly with the other towns, it is clear that the powers of such a board should not be extended by implication beyond the performance of the joint municipal duty which made some such device necessary. If, on the other hand, we regard the board as a municipal corporation, it is one with very limited powers, created for a specified duty only, and must be judged by the rule applicable to such a corporation. Public or municipal corporations are not associations, but are sub-divisions of the State. The charter of such a corporation is not a contract between the corporation and the State, nor between the corporators themselves. The effect of an Act of the legislature incorporating a municipality is to invest the governing authorities of the municipality—either a majority of the voters, or such officers as are prescribed—with the power of local government over the inhabitants of that district. Such an Act, strictly speaking, confers powers which did not exist before; it confers on the governing authority the power of laying taxes, and passing local laws for the purposes named in the Act, without the

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previous consent of the people of the district. The governing authorities possess no powers or faculties not conferred upon them either expressly or by fair implication by the law which creates them, or by other statutes applicable to them. Dillon on Mun. Corp. § 21; Morawetz on Corp. §§ 24, 649, 1046; *Coler* v. *Cleburne*, 131 U. S. 162.

A municipal corporation has no power by implication, unless it is one that may be necessary to the successful carrying out of those powers which are expressly given. It is more reasonable to suppose that the legislature, in creating a corporation, intended that it should succeed rather than that it should fail. Hence the courts hold that such necessary powers were really intended to be granted. If the powers expressly given can be exercised without aid from implication, then nothing can be implied. And there can be no implication of a power existing in a corporation inconsistent with those which are expressly granted. Obviously a power destructive of those expressly granted, cannot be implied. Perpetual continuance is ordinarily an essential ingredient in the idea of a corporation. A corporation cannot put an end to its own existence; it certainly cannot unless the power to do so is expressly given to it. The said board had no power to make the orders in question obligatory on the defendant town, unless it had the implied power to employ agents to appear before the legislature to procure legislation to terminate its own existence. Such an implication cannot be admitted.

A large part of the defendants' argument is devoted to the claim that the town of East Hartford might — as could any other town in the State—lawfully employ counsel or agents to appear before the legislature to procure any legislation in which the town conceives itself to be interested. They cite *Farrel* v. *Derby*, 58 Conn. 234. That case, however, goes no further than to hold that a town may lawfully expend money it has raised by taxation, to protect its corporate integrity, privileges, or property, from adverse legislation. The doctrine of that case is one that is not to be carried further. It cannot be stretched into an authority justifying a town to

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embark in legislative attacks on other corporations, because the town might think itself benefited thereby.

In one aspect of this case it is entirely immaterial whether the town has or has not power to employ agents to appear before the legislature. If the town of East Hartford has power to employ agents or attorneys for that purpose, it has not done so in this case. In another aspect of the case the question of the power of the town to employ agents for such purpose, is material, and that is on the claim of a ratification. The defendants say that the town of East Hartford has ratified these orders. The averments in the pleadings from which ratification is claimed, are these: In the eighteenth paragraph of the complaint it is alleged that "the said defendants, the said town of East Hartford and the said Merriman as treasurer of said town of East Hartford, intend to pay the said four illegal orders amounting to the sum of $5,000 now outstanding and unpaid as hereinbefore set forth." And in the eighteenth paragraph of the answer it is alleged as follows: "In the annual report of the selectmen and treasurer and other officers of said town of East Hartford to the town of East Hartford, in the year ending September 11th, 1889, and in other such reports, there was contained, as a liability, a statement that said orders were still outstanding as an immediate liability to the amount of $5,000, bearing interest at the rate of 5 per cent., and said report, with said statement of said orders as liabilities, was accepted by said town of East Hartford."

The claim as stated is like this: The town itself might have employed the agents and attorneys to appear before the legislature to procure the legislation by which it was released from contributing towards the expense of the free highway; the said board did employ attorneys who went before the legislature and procured such legislation and which benefited the town; in payment for the services so rendered the board issued the orders in question, and now the town, by the action so above alleged, has ratified those orders; and as there can be no ratification of a contract unless there was power to enter into that contract originally, the question of

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the power of a town to employ agents to appear before the legislature might be material.

It would be material, if the disposition of this case depended on it. We have no occasion, however, to pass upon that question, for the reason that the allegations of the pleadings do not show a ratification. There is no ratification unless the party has full knowledge of all the facts, nor unless there is the intent to ratify. *Dibble* v. *New Haven*, 56 Conn. 199, 202; *Stanton* v. *New York & E. R. Co.*, 59 id. 272, 281; *Ansonia* v. *Cooper*, 64 id. 536, 544. The allegations here fail to show that the town had full knowledge, and fail to show that there was an intent to ratify. We think there was no ratification.

The orders were not negotiable so as to estop the plaintiff or the town of East Hartford from showing their illegality in the hands of the present holders. Municipal orders or bonds are not ordinarily negotiable. The orders in this case are similar to, and in effect precisely like, the orders discussed by the Supreme Court of the United States in the case of *Mayor* v. *Ray*, 19 Wall. 468, 477,—a case in which the city of Nashville, Tenn., had issued orders for the payment of money borrowed by the city. There was no express authority in its charter for the city to borrow money for any purpose. MR. JUSTICE BRADLEY, in giving the opinion of the court, said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it into the power of corrupt officials to involve a political community in irretrievable bankruptcy.

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No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied. . . . But where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort, at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to made them negotiable, that is, transferable by delivery or indorsement. This quality renders them more convenient for the purposes of the holder, and has, undoubtedly, led to the idea so frequently, but, as we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper—freedom from all legal and equitable defenses in the hands of a *bona fide* holder. But every holder of a city order or certificate knows, that to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it was lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its taxpayers, or people. Persons receiving it from them know whether it is issued, and whether they receive it, for a proper purpose and a proper consideration. Of course they are affected by the absence of these essential ingredients; and all subsequent holders take *cum onere*, and are affected by the same defect." It was holden that the order was invalid and that there could be no recovery against the city.

These considerations exactly apply to the present case, and show that the orders enjoined against were not negotiable. 1 Daniel on Neg. Inst. p. 324, § 427; Cooley on Const. Lim. (6th ed.), 269; Dillon on Mun. Corp. §§ 122, 406, 457, 733; Beach on Public Corp. § 195.

There is no error.

In this opinion the other judges concurred.

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HENRY RUGGLES, EXECUTOR, *vs.* EDWARD E. RANDALL ET AL.

Second Judicial District, Norwich, October Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A Connecticut testator gave a pecuniary legacy to "the heirs" of a deceased niece. *Held* that the legacy vested as a class gift, *per stirpes*, in those persons who constituted her heirs at the time of the testator's death, without regard to whether they answered that description at the time of her decease.

The word "heirs," when used in a will, primarily signifies those entitled by law to inherit by descent the real estate of a deceased person; and a resort to secondary meanings of the word will ordinarily be had, only when adherence to the primary meaning would make the provision under consideration ineffectual or plainly unreasonable.

In this State the widow is not an "heir" of her deceased husband, within the primary signification of that word.

The testator gave his niece *K* "and her husband" $500, and provided that if he, the testator, survived them (which was not the case), "said sum so intended for her" should become part of the residue of his estate. *Held* that *K* and her husband each took $250.

A provision for the heirs of certain nieces gives nothing to the surviving husbands of such nieces.

After giving $400 each to *A*, *B* and *C*, the will provided that if the testator survived either or all of them, then said $400 should be paid "to their or each of their heirs." *Held* that this meant that the legacy to each was to be divided among the heirs of each, not that each of such heirs was to get $400.

The residuary clause of the will authorized the executor to convert the whole estate into money and pay the "legatees named," and if there was not enough to pay them in full, then to make a proportional deduction from each "legacy named;" and directed that if there was a surplus it should go to "all the legatees named in this will, to be equally divided among them all, all to share and share alike and in equal amounts of the same." *Held*:—

1. That all those who were to receive bequests were equally "named," whether described by their individual names, or as members of a class, like "heirs" or "children," or as occupying a certain relation to another, such as a "husband."
2. That the surplus was not to be divided *per capita* among all those who might take as legatees, but among the classes of legatees, each class, however numerous, being treated as a unit for this purpose.

[Argued October 19th—decided November 30th, 1897.]

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SUIT to determine the validity and construction of the will of Thomas J. Ridgway of Norwich, deceased, brought to the Superior Court in New London County and reserved by that court, *Shumway, J.*, upon the allegations of the complaint and answers, for the consideration and advice of this court.

The material portions of the will were as follows: —

"Item 1. I give and bequeath to the children of my late niece Catherine Randall, now deceased, who was the wife of John P. Randall of Pittston, Pennsylvania, the sum of Eight Hundred Dollars ($800) to be equally divided between them to share and share alike, to them and their heirs forever.

"Item 2. I give and bequeath to my niece Antoinette King (widow) of Stanhope, New Jersey, the sum of Eight Hundred Dollars ($800) and in case she dies before me the said sum of Eight Hundred Dollars I give and bequeath to her heirs to be divided equally among them.

"Item 3. I give and bequeath to my niece Amanda Jewett of Apalachine, State of New York and [in] case of her death before me to her heirs forever, the sum of Five Hundred Dollars ($500). . . .

"Item 8. I give and bequeath to the heirs of my niece, Minerva Ennis of Hoboken, New Jersey, the sum of Five Hundred Dollars (500).

"Item 9. I give and bequeath to my niece, Martha Kimball and her husband of Lackawaxen, Pennsylvania, the sum of Five Hundred Dollars, (500) but in case I survive them said sum so intended for her shall become and remain a part of my residuary estate to be disposed of as hereinafter directed. . . .

"Item 14. I give and bequeath to the heirs of Mary Gibbs, deceased, of Danville, Pennsylvania, the sum of Five Hundred Dollars (500). . . .

"Item 19. I give and bequeath to Mrs. Amanda Rockwell of Milford, Pennsylvania, to Mrs. Minerva Hazen of Rowland, Pennsylvania, and to Louis P. Hazen of Chicago, Ill., the sum of Four Hundred Dollars ($400) each. In case I shall survive either or all of the persons last named then the said sum of four hundred dollars so intended to be given to

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said deceased shall be paid to their or each of their heirs and I give and bequeath the same to them forever. . . .

"Lastly. I do hereby fully authorize and empower my executor hereinafter named to convert all my real and personal estate which I may die possessed of (except such as I shall reserve to be distributed without inventory) into money, by sale or otherwise as he shall judge to be for the best interest of all the legatees named in this my last will and testament, and to pay the legatees named in this will their respective sums as soon as the same can be done and comply with the laws of this State governing the settlement of estates of deceased persons, and if after the sale of my property as above directed and after the payment of my debts and funeral expenses, it shall be found that my estate will not pay the legacies in full, in that case a proportional deduction is by me directed to be made by my executor from each legacy named in this will and each legacy to be paid according to such deduction and in case there shall be a surplus of my estate more than sufficient to pay the several legacies herein named said surplus shall become a part of my residuary estate. All of said surplus and all the rest and residue of my estate I give bequeath and devise to all the legatees named in this will to be equally divided among them all, all to share and share alike and in equal amounts of the same."

The will was executed July 19th, 1894, and the testator died in 1896, leaving no widow or descendants.

Minerva Ennis had died in 1891, leaving several children, one of whom, David R. Ennis, died in 1895. Her husband is still living. David R. Ennis left a widow and two married daughters.

Martha Kimball and her husband both survived the testator. She died before this suit was instituted, and he is insane.

Amanda Jewett had died in January, 1894, leaving descendants and a husband.

Mary Gibbs had died unmarried, leaving brothers and a sister and children and grandchildren of a deceased brother.

Amanda Rockwell had died in 1893, leaving children.

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The questions as to which the advice of the court was asked, were as follows:—

1. To whom and in what shares, shall be paid David R. Ennis' part of the legacy given in Item 8 to the heirs of Minerva Ennis? 2. To whom is payable the legacy given in Item 9? 3. Have the respective surviving husbands of Amanda Jewett, the legatee named in Item 3, and of Minerva Ennis, mentioned in Item 8, any interest in the legacies given in those items, respectively, and if so, what interest? 4. Regarding the legacy given in Item 14 to the heirs of Mary Gibbs, what disposition is to be made of the share in said legacy of William J. Gibbs, who was an heir of Mary Gibbs at her death, but died before testator? 5. Owing to the fact that the testator survived Amanda Rockwell, but died before Louis P. Hazen and Minerva Hazen, the legatees named in Item 19, what disposition shall be made of the $400 intended to be given to said Amanda? 6. Whereas the testator in the last section of said will provides as follows: "All of said surplus and all the rest and residue of my estate I give, bequeath, and devise to all the legatees named in this will to be equally divided among them all, all to share and share alike and in equal amounts of the same;" and whereas many of the legatees named in said will died before the testator, and the legacies which they would have taken if alive are by said will given in case of their death to their heirs who are not named, and whereas in items 1, 8 and 14, no legatee whatever is mentioned by name; what disposition shall be made of said residuum?

Wallace S. Allis, for Edward E. Randall et al.

Gardiner Greene and *Arthur B. Calkins*, for Eliza E. Griswold et al.

Amos A. Browning, for Henry B. King et al.

BALDWIN, J. The legacy to the heirs of the testator's deceased niece, Minerva Ennis, was a class gift which vested

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upon his decease in her descendants who were then living, *per stirpes*. The will, like every other, is to be read as if executed at the moment of the testator's death. Whoever were, at that time, her heirs, in the sense in which he employed that word, are to take, without regard to whether they did or did not answer that description at her decease. *Gold* v. *Judson*, 21 Conn. 616, 623.

The word "heirs," in its strict and primary meaning, signifies those entitled by law to inherit by descent the real estate of a deceased person. It is also popularly used to denote those entitled by the statute of distributions to succeed beneficially to the personal estate of a deceased person. The will now before us, while purporting to dispose of both real and personal estate, contemplated a conversion of the whole into money; and the provision for the heirs of Mrs. Ennis, even assuming that under the residuary clause they are to share in the proceeds of real estate, should therefore be treated as a bequest of personalty.

As a general rule its primary legal meaning should be given to every word in a will, unless the context, when read in the light of the circumstances surrounding the testator, shows clearly that it was used in a different sense. *Leake* v. *Watson*, 60 Conn. 498, 506, 508. The fact that the word now in question occurs in a disposition of personal estate is to be given due weight; but it is not conclusive. *Mullen* v. *Reed*, 64 Conn. 240, 248. Resort will ordinarily be had to secondary meanings, in cases of testamentary construction, only when adherence to the primary meaning would make the provision under consideration ineffectual or plainly unreasonable. No such result follows from assigning to the term "heirs of my niece, Minerva Ennis," its proper legal signification. On the contrary, it is highly improbable that the testator would prefer to her lineal descendants those who might be the statutory successors to her personal estate under the laws of New Jersey, with which it is not to be presumed that he was acquainted. It is also worth remark that in "Item 2" his contingent bequest to the heirs of another niece living in the same State, was to be equally divided between them; a fixed

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rule being thus imposed, without regard to any statutory mode of distribution. The word "heirs," therefore, is to be taken in its primary meaning, under the laws of Connecticut, this being the State where the testator had his domicil, and executed his will. It follows that the children of David R. Ennis together take one fourth of the legacy in question, and that his widow takes nothing. *Morris* v. *Bolles*, 65 Conn. 45, 58.

Martha Kimball and her husband were each entitled to $250, under "Item 9" of the will. The reference to "said sum so intended for her," cannot avail either to double her legacy, or to deprive her insane husband of that which had been expressly given to him. While he, no doubt, was thus remembered only because of his marriage to her, the testator intended to benefit her by benefiting him.

The provision for the heirs of Minerva Ennis and Amanda Jewett, each of whom had died leaving descendants who survived the testator, enured solely to the benefit of such descendants, and the husbands of these nieces took nothing.

For the reasons already stated in discussing the legacy to the heirs of Minerva Ennis, the "heirs of Mary Gibbs, deceased," were her brothers and sister and those of the descendants of her deceased brothers who were living when the testator died; sharing *per stirpes*. What would have fallen to William J. Gibbs, had he survived the testator, is to be divided into six parts, of which each of his children takes one, and that remaining goes to the children of his deceased son. *Cook* v. *Catlin*, 25 Conn. 387.

The death of Amanda Rockwell before the testator, brought into operation the clause of the will intended to be for the benefit of her heirs. While inartificially expressed, it is sufficient to send the legacy to them, and insufficient to multiply it by their number. Each takes an equal share in $400.

The residuary clause empowers the executor to convert the whole estate into money in such manner "as he shall judge to be for the best interest of all the legatees named," and "to pay the legatees named their respective sums" as soon as may be, and directs that if the estate should prove

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insufficient to "pay the legacies in full," a proportionate deduction is to be made "from each legacy named," but that if there be "more than sufficient to pay the several legacies herein named," the surplus shall go "to all the legatees named in this will, to be equally divided among them all, all to share and share alike, and in equal amounts of the same." This use of the word "named" as descriptive of all the legacies, that were to be paid, shows that he meant it, when employed to designate legatees, to have the same application, and include all to whom these legacies were to be paid. He had directed that certain sums should be paid under the twenty-five preceding "items" of his will, and the sums so named were the "legacies herein named." Those who were to receive them were equally "named," whether described by their proper individual names, or as members of a class like "heirs" or "children," or as occupying a certain relation to another, such as a "husband." *Bromley* v. *Wright*, 7 Hare, 334.

It is equally evident that while he meant that those who might suffer by an abatement, in case of a deficiency of the estate, should be the ones to profit by a surplus, in case a *residuum* were formed, he did not intend that in that event they should have a precisely corresponding benefit. Any abatement was to be proportional, as respects each legacy; but any increase was to be the subject of equal distribution among "all the legatees named."

Following the interpretation already assigned to the term "all the legatees named," by which it is to be understood to include those named by any class description, we think that the class receiving any legacy, however numerous, should be treated as a unit, as respects the division of the surplus. The right to share in it was an incident of each of these legacies, and it is more reasonable to suppose that the testator intended the number of shares to be that of the different legacies that took effect, than that of the individuals between whom these legacies might, by the accident of death and consequent substitution, happen to be divided. It was uncertain, in the testator's mind, whether there would be any residuary estate.

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There were, in all, twenty-seven legacies given to as many individuals or classes, and of these eighteen were subject to lapse. The number of residuary shares, therefore, under the construction of the will which we adopt, could not exceed twenty-seven, and might be only nine, while if the division were to be made *per capita*, among all the individuals who shared in any legacy, the portion of each might be a mere trifle. It is to be presumed that the testator intended that his residuary legatees should receive, if anything, what would be of substantial benefit.

The Superior Court is advised to enter a decree in conformity with this opinion.

In this opinion the other judges concurred.

DENISON D. BREWSTER *vs.* HENRY L. ALDRICH ET AL.

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Second Judicial District, Norwich, October Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY AND HALL, Js.

It is the duty of the trial court to see that a complaint which contains the common counts only, is amended before the cause is heard, by striking out all of the counts to which the plaintiff's bill of particulars does not relate.

In an action upon the common count for work and labor, the plaintiff's bill of particulars alleged that the work was done at an agreed price, the amount of which was stated. *Held* that the plaintiff might prove and recover the reasonable value of his work and labor, notwithstanding such allegation of a specific contract price.

[Argued October 19th—decided November 30th, 1897.]

ACTION to recover for work and labor, brought to the Court of Common Pleas in New London County and tried to the court, *Noyes, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendants for alleged errors in the rulings of the court. *No error.*

The bill of particulars filed by the plaintiff, was as follows:

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H. L. Aldrich & Son.

1889.	To D. D. Brewster,	Dr.
To kalsomining rooms in mill at agreed price		$400.00
Aug. 19	To work of 6 men 1 day each, painting	15.00
" 20	" " " "	15.00
" 21	" " " "	15.00
" 22	" " 4 "	10.00
Sept. 6	" " 3 "	7.50
" 7	" " 3 "	7.50
" 9	" " 3 "	7.50
" 10	" " 3 1/2	3.75
		$481.25

The finding stated the following facts: "1. The plaintiff brought his action upon the 'common counts' with bill of particulars, the defendants filed their answer, and the plaintiffs replied—all as on file. 2. At the commencement of the trial the plaintiff, by leave of the court, amended his complaint by striking out all the counts except the one now remaining. 3. In July, 1889, the plaintiff, who is a painter, agreed with the defendants, who are the owners of a cotton mill in Moosup, Connecticut, to do the labor of kalsomining and painting the interior of said mill, one coat, for $400, and to do a good job, one coat work. It was agreed that the work should be done while the mill was in operation, and the plaintiff examined, and had full opportunity to examine, the premises before making the agreement. 4. The work contemplated under said contract is stated in the bill of particulars, which also includes one day's extra work painting, which was performed at the request of the defendants and which was worth $2.50. The other items of painting stated in the bill of particulars were contemplated and performed under said contract, and were not allowed as extra work. 5. The plaintiff did a good job, one coat work, considering the nature of the work required and the circumstances under which it was required to be done, and executed his part of the agreement before the commencement of this action. 6. It was agreed upon the trial that the items in the plea of set-off should be treated as

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payments, if the plaintiff was entitled to recover. 7. There is due the plaintiff from the defendants, after deducting such payments from the contract price, a balance of $177.54; for which amount, with $2.50 for said extra work, and interest, judgment was rendered as on file. Upon the trial the defendants claimed and asked the court to rule: (1) That the plaintiff could not recover on said contract, because the plaintiff had not proved the contract referred to in the first item of his bill of particulars. (2) That the plaintiff could not recover on said contract upon the count set forth in his complaint. The court did not so rule, but rendered judgment as on file."

The defendants appealed and filed two reasons of appeal: the first, that the court erred in not sustaining their first claim; and second, that the court erred in not sustaining their second claim.

Solomon Lucas, for the appellants (defendants).

Frank T. Brown, for the appellee (plaintiff).

ANDREWS, C. J. The bill of particulars was applicable only to the count for work and labor. It was the duty of the plaintiff to file his bill of particulars and to strike out the other counts, before the defendant could be called upon to plead, and of the trial court to see that this was done, before hearing the cause. *New York Breweries Corporation, Limited*, v. *Baker*, 68 Conn. 337, 342.

Under the first assignment no error appears. The finding of facts shows that the plaintiff had proved the contract referred to in the first item of his bill of particulars.

Nor does any error appear under the second assignment. The plaintiff might lawfully recover on the contract, unless the count was insufficient in substance, or unless there was a material variance. Nothing appears in the finding or in the record to show either. An immaterial variance could have no effect. The most that can be claimed is that the contract alleged was for an agreed price, and that the plaintiff did not

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prove the price so alleged to have been agreed upon; and the court rendered judgment for the reasonable value of the work and labor performed. This was not error. Rules of Practice, II, § 3, p. 12.

There is no error.

In this opinion the other judges concurred.

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JOHN J. BERGIN, ADMINISTRATOR, *vs.* THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY AND THE MERIDEN ELECTRIC RAILROAD COMPANY.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

It is not unlawful for a telephone company and an electric street railway company to use the same poles in a city street; especially when requested to do so by the municipal authorities.

The conclusions of the trial court as to negligence and contributory negligence cannot be reviewed upon appeal, unless it appears that an incorrect standard of duty was applied, or some rule or principle of law, applicable to the facts found, was violated.

At the request of the municipal authorities the defendants agreed to use a common pole in certain streets, and the shifting of the wires from the old to the new poles was undertaken by the telephone company. *Held* that there was no absolute rule of law which imposed the duty of inspecting and testing the guy-wires and circuit-breakers of the street railway company, upon the telephone company rather than upon its employés who shifted the wires.

Whether the master or servant should discharge this duty of inspection in a particular case, depends upon a variety of circumstances, and in some instances becomes a question of fact for the determination of the trial court.

A telephone lineman who knows, or has reasonable cause to believe, that the wires of an electric street railway company are in a dangerous condition, is bound to use due care, in view of such knowledge, to avoid injury to himself, notwithstanding the negligence of the railway company.

The plaintiff, who sued as administrator to recover damages for personal injuries resulting in the death of his intestate, assigned as

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error several rulings of the trial court in respect to evidence. *Held* that these rulings, even if erroneous, were harmless, inasmuch as it clearly appeared from the record that the plaintiff's right of recovery was defeated by the contributory negligence of his intestate, —a conclusion which the rulings complained of in nowise affected.

Upon a hearing in damages after a default, the plaintiff, having shown the extent of the injury, is entitled to substantial damages, unless the defendant proves either his own freedom from negligence or contributory negligence of the plaintiff.

[Argued October 26th—decided November 30th, 1897.]

ACTION to recover damages for personal injuries resulting in the death of the plaintiff's intestate, brought to the Superior Court in New Haven County and heard in damages to the court, *Shumway, J.;* facts found and judgment rendered for nominal damages only, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The complaint alleged that the defendants were, without authority, operating their system jointly; that defendants were negligent in using the defective circuit-breaker described below, and in permitting the deceased to work at the place in question when they knew, or by the exercise of a reasonable supervision should have known, that the circuit-breakers were defective; that plaintiff's intestate was in the exercise of due care, and was not aware that it was his business to know of the dangerous condition of the span-wire by reason of the defective circuit-breaker.

The following facts were found by the court: The defendant, the Southern New England Telephone Co., in operating its telephone lines, has frequent occasion to take down and build lines of wires; and frequently the municipal authorities desire the wires of the telephone company, of the street railway company, and of the electric company, to be on the same pole.

The plaintiff, on November 13th, 1895, was appointed administrator of the estate of Timothy Delaney, an experienced lineman of the defendant telephone company, who was killed at Meriden on August 12th, 1895, while upon the ground coiling a wire of his employer, which rested on a cross-arm of a pole jointly used by the defendants.

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The Meriden Electric Railroad Company is by its charter authorized to carry on the street railroad business in the city of Meriden, upon Main street and elsewhere, by electricity, by means of the overhead or trolley wire system. The current of electricity used by the telephone company is harmless. The current used in the electric street railway company is between 500 and 550 volts, and while not usually fatal, is dangerous.

The telephone company management at the time of the accident, was as follows: a president, who is the general manager of all its departments; a general superintendent, who has general charge of all construction work throughout the State, more especially relating to the plans of such work; two division superintendents, whose duty was to carry out the orders of the general superintendent, and oversee the construction work in their departments. The western department, where the accident occurred, was in charge of one W. S. Crofut. The actual work of construction and changes was done by gangs of workmen, each being assigned to a separate job. At the time of the accident there were several gangs at work under the general superintendence of Crofut. Each gang consisted of a foreman, two or three or more linemen, and two or three or more groundmen. The groundman works mainly on the ground, digging post holes and other such work. A lineman is frequently termed a climber; his special duties are in climbing poles and working at the wires, cross-arms, etc., at the tops of the poles. He is frequently required to do ground work. The foreman gives orders to the men during the course of the work. He is equipped with apparatus for climbing poles, and is expected to climb poles and work at the wires at the top of the poles, as occasion may require. The division superintendent gives no instructions to the gang as to how the work shall be performed in detail.

At the time of the accident Delaney, the deceased, had been in the employ of the telephone company for many years; first as a groundman, but most of the time as a lineman. He was a competent lineman, familiar with the nature of the business in which he was employed.

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At the request of the city of Meriden the electric street railway company and the telephone company agreed to use a common pole through certain streets, and the work of shifting the wires from the old poles upon the new line of poles was performed by the telephone company. The trolley wire of the electric street railway company, where the accident happened, was held in position by a span-wire directly crossing the street from pole to pole, and from which the trolley wire was hung. Then from each of the two opposite poles there ran a wire towards the next two opposite poles, and in a diagonal direction, meeting at the center, between two sets of poles on the trolley. These wires are called guy-wires. They are connected directly with the trolley wire, their object being to keep the trolley wire from slipping lengthwise. A short distance from the junction of these guy-wires with the trolley wire, the electric street railway company had inserted what is called a circuit-breaker. This is a ball made up of insulated substance, the wire connecting at one and the other side of it, and thus the current of electricity is arrested. It was the usual method of construction so far as the guy-wire is concerned. These circuit-breakers ordinarily perform their work successfully. They were put in by the street railway company in the original construction of the work, and the telephone company was not expected to overhaul the circuit-breakers on these guy-wires in the work of shifting the wires of both companies to and upon the new poles. When for any cause a circuit-breaker becomes sufficiently defective, then the electricity passes through the circuit-breaker upon the wire beyond.

Delaney had, long before the accident in question, received the printed book of the company, containing its rules, among which was the following: "The company will not be liable any further than above for doctors' fees and other expenses incurred by reason of accidents, and employees are cautioned against placing themselves in hazardous positions, climbing unsafe poles, handling electric light and power wires;" and his attention had been specially called to this rule. He had also been personally shown by Mr. Crofut, when at work

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upon a job of a similar character in Ansonia, the danger arising from the possible escape of the electric current from street railway wires upon the wires of the telephone company, and it had been pointed out to him by Mr. Crofut at that time how he could detect it. A common method, then shown to him by Crofut, is by applying to the suspected wire one end of a wire the other end of which is in the ground, to find out by the flashes whether the electricty passes from the suspected wire into the wire reaching to the ground. Such method of inspection was also commonly and well known among linemen.

Linemen are employed by the telephone company, among other things, for the purpose of doing work which is dangerous by reason of the possible contact of the telephone wires with highly charged wires of the street railway or other companies. The linemen are to do their own testing in such work; the telephone company has no other men than the linemen to do the testing, as the linemen knew; there was nothing to prevent Delaney from testing the guy-wire; and the linemen on this job were furnished with all the tools, appliances and wires with which to test wires of the electric street railway company.

One Butler was foreman of the gang of men set to work upon this job of transferring both sets of wires to one pole, the upper part of which pole was to be the exclusive property of the telephone company, and the lower part of the street railway company. He cautioned Delaney as to the dangerous character of the work, especially the dangers which might come from the escape of the powerful electric current in the trolley wires into some of the wires which they might be called upon to handle. In the previous progress of this Meriden job there had been called to Delaney's knowledge two instances where the circuit-breakers of the electric street railway company on guy-wires were defective, and where the electric current passed through the trolley wires upon the telephone wires, and caused considerable damage in burning out telephones, etc., although there was no damage to persons. In these cases the electric railway company furnished new

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circuit-breakers, which the linemen of the telephone company inserted in place of the defective circuit-breakers, as Delaney well knew. The work of insertion, to a lineman, is insignificant in point of time or skill. Delaney was the next man in the gang, and in the absence of Butler had the charge thereof.

The accident occurred by reason of a defective circuit-breaker on one of the guy-wires, in the following manner: Two linemen in the gang, about three days before the accident, in the course of their work had unfastened this particular guy-wire from its old pole and lashed it upon the new pole. In so doing they felt no electric shock. They were on a wooden pole, which served as a non-conductor. Whether being on a wooden pole a person will receive a shock of electricity or not, depends upon a variety of circumstances. A day or two after the guy-wire had been lashed to the new pole, one Flannigan, a groundman, was sent up the new pole to its top for a certain telephone purpose, and on his way up took hold of the guy-wire, on which was the defective circuit-breaker, and felt a distinct shock of electricity. On his way down the pole, after completing his work, he carefully avoided touching that wire. At this time Delaney, Flannigan, and another groundman were working together, and Butler, the foreman, was absent. Meeting Delaney at the foot of the pole Flannigan said to him that he had just had a shock from that guy-wire, indicating which one it was. Delaney made light of it and did not take any steps to test the accuracy of Flannigan's information, nor did he report the same to Butler. A short time afterwards it became necessary to take down a telephone wire which had been strung up on top of the new poles. Such work is done by cutting it at various places, then taking it off the poles, and coiling it. Butler assigned one Davis, a lineman, to coil the wire, and Delaney to cut it, and then went off to another part of the job at some considerable distance, giving no other instructions as to how the work should be done. Delaney told Davis to cut the wire, and he, Delaney, would coil it up. Davis cut the wire at the proper place, and Delaney began to coil it up. In doing so he pulled it directly from the top of the poles on which it

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rested; and it was perfectly obvious to him that the way in which he was doing the work would bring the telephone wire directly upon the guy-wire pointed out to him by Flannigan, as above described, and which in fact contained the defective circuit-breaker. He was pulling and coiling the wire but a short distance from the pole to which was lashed the guy-wire containing the defective circuit-breaker, and this pole was the nearest one to his place of work. Obviously, when the wire should be pulled off the pole beyond, it would drop from the last pole and strike the guy-wire which in fact was charged with the electric current from the trolley. He paid no attention to the manner in which his wire would come upon the guy-wire, nor did he take any steps to prevent the telephone wire from striking the guy-wire. There were two methods usually employed by gangs in taking down a telephone wire from above a dangerous electric wire. One was for a man to take a rope and fasten one end to the wire, and guy it off from any possible contact with the dangerous wire. Another was for a lineman to climb a telephone pole and take the wire, which is not very heavy, from the telephone pole and throw it off the arm on the side opposite the guy-wire, thus getting it off upon the ground before coiling it. There were ropes in the gang team of the telephone company upon the premises, and Delaney could have had the services of one of the gang, if he had asked for them. It was also entirely easy for him, alone, to have taken the wire off the pole in question, by throwing it into the street, and away from the dangerous guy-wire. In pulling and coiling the wire, standing at the same time on damp, moist ground, and his clothing being wet with perspiration, the telephone wire struck the dangerous guy-wire, and Delaney instantly fell forward on his face, became at once unconscious, and died in a few moments.

Except as above stated, there was no knowledge or information in any officer, agent, or employee of the telephone company, or of the electric railroad company, of the defective condition of this circuit-breaker.

On the trial it was shown that the plaintiff, before he was

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appointed administrator, applied to the Southern New England Telephone Company for funds with which to properly bury Delaney. The proper officers of the telephone company, protesting that the company was not liable for the accident, declined to give anything unless all claim against the company on account of the accident should be released and discharged. Thereupon it was agreed between the plaintiff and the telephone company that all claims against the company should be released and discharged, and the company would furnish funds to bury the deceased. In pursuance of such agreement the telephone company did furnish funds for the suitable burial of Delaney. Subsequently the plaintiff took out letters of administration upon the estate of Delaney, and brought this suit, but has never refunded said money. The telephone company claimed upon the trial that the agreement of the plaintiff and his conduct, as above described, were the agreement and conduct of an administrator *de son tort*, and effectually discharged the cause of action set up in the complaint. The defendant, the street railway company, claimed that such discharge of the telephone company operated as a discharge of it also. To the admission of this evidence the plaintiff objected. The objection was overruled, and the plaintiff excepted; but the court did not rule that these facts constituted a release of the cause of action.

The defendants also offered the testimony to show that the plaintiff made application for his appointment as administrator, as a creditor of the estate of Delaney, that he was the active man in the matter, and that this, in connection with his conduct in assuming to settle all claims with the telephone company, made it admissible; especially so, as said application disclosed that the persons entitled by our law of distribution to the avails of this suit were residents of Ireland, and consequently Bergin was the one who did whatever was done, both in procuring funds to bury Delaney, in bringing this suit, and in having an administrator appointed. The court admitted this evidence as bearing upon the claim that the plaintiff at the time he made the settlement with the telephone company was an administrator *de son tort*, and to this ruling the plaintiff excepted.

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At the time of the injuries complained of, there was an instrument in use whereby, at the power-house of an electric railroad, at a time when the cars are not running, any leakage by means of defective circuit-breakers, or otherwise, could be ascertained and located; but the defendant, the Meriden Electric Railroad Co., had no such instrument at its power-house on or prior to August 12th, 1895.

The construction of the lines of both defendants was of standard design and ordinarily suitable for the purpose for which each was intended, and the appliances used by both defendants were ordinarily competent and reasonably adapted to their use.

The instrument above referred to would not disclose any leakage from a circuit-breaker to a pole, under all circumstances, but would disclose a leakage into the ground.

In the course of the trial the defendant, the Meriden Electric Railroad Company, offered one Edmund C. Boynton, an electrical expert and, among others, asked him the following question: "Q. Now, Mr. Boynton, suppose that a man is coiling up wire which he is taking down from the poles; pulling it down; pulling off the poles, not coiling at this time, and suddenly receives an electric shock from off that wire, and is thrown to the ground, so that he falls upon the wire when the wire is about his body and his arms, more or less, and the ground is wet, and his clothes are wet with perspiration, what have you to say as to the conditions of such a case so far as receiving the full current of electricity?" To this question the plaintiff objected, on the ground that some of the assumptions in the question had no foundation in fact: first, that the wire was coiled around his arm; second, that he was walking away from the pole. The question was allowed, and the plaintiff duly excepted. The evidence was conflicting as to whether the deceased was walking and facing away from or towards the pole at the time he received the shock; also as to the exact manner in which he was holding the wire.

During the trial the Meriden Electric Railroad Co. offered the notice required by law in such cases, which had been served on it, for the purpose of showing the injuries for which

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damage was claimed. To its introduction the plaintiff objected, on the ground that as this was a hearing in damages after a default, the sufficiency of the notice was admitted by the default, and all question of the notice was eliminated from the case. The notice was ruled in, and the plaintiff duly excepted.

During the trial the plaintiff offered to prove what was said by Butler, who was the foreman in charge of the men working for the telephone company, about the said defective insulator at the time it was taken off some days subsequent to Delaney's death, and relating to the then condition of said insulator. The court excluded it and the plaintiff duly excepted. The plaintiff then offered to prove the said Butler's statement about the said insulator when it was removed, to show the defective condition of the same when it left the factory, and before it had ever been used. The court ruled the statements out on the ground that they were hearsay, to which ruling the plaintiff duly excepted.

The evidence offered at the hearing against the electric railroad company was made applicable to the hearing had against the telephone company.

Upon the foregoing facts the plaintiff claimed: that the defendants were liable as joint tort feasors for the injuries to Delaney resulting in his death, because they were at said time and place jointly using and employing their poles and wires without legislative authority; that the Southern New England Telephone Company was guilty of the only negligence causing the injuries; that the Meriden Electric Railroad Company was guilty of the only negligence causing the injuries; that the combined negligence of the defendants caused the injuries; and that the plaintiff was entitled to substantial damages.

The court did not rule as claimed by the plaintiff, but assessed nominal damages only. And the court finds from the foregoing facts, if such conclusion is a question of fact, that said Timothy Delaney was guilty of negligence materially contributing to his injury, and the Southern New England Telephone Company was free from negligence.

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James P. Pigott and *Cornelius J. Danaher*, for the apellant (plaintiff).

John W. Alling and *James T. Moran*, for the appellee (So. New Eng. Tel. Co.).

Seymour C. Loomis, for the appellee (Mer. Elec. Ry. Co.).

HALL, J. It was not unlawful for both defendants to use the same poles. Such joint use was with the consent of both companies, and at the request of the municipal authorities. It has not been shown to be necessarily attended with increased danger. By reducing the number of poles the highway is used with greater convenience. Full control of the location of such wires and structures is given to the local authorities by § 3946 of the General Statutes and § 3 of Chap. 169 of the Public Acts of 1893.

The court has found that the defendant telephone company was not negligent. This is a question of fact which it has been repeatedly held cannot be reviewed by this court upon an appeal, unless it appears that the trial court did not apply the correct standard of duty in reaching its conclusion, or violated some rule or principle of law applicable to the facts as found. *McAdam* v. *Central Ry. & Elec. Co.*, 67 Conn. 445; *Dundon* v. *New York, N. H. & H. R. Co.*, ibid. 266; *Sprague* v. *New York & N. E. R. Co.*, 68 id. 345.

The degree of care and duty imposed by law was apparently applied to the defendant telephone company by the trial court, in testing its conduct in regard to negligence. Neither its conclusion from the facts found, nor any ruling of the court during the trial, indicates that it did not charge the telephone company with its legal duty as to providing for its employees a reasonably safe place and reasonably safe tools and appliances for their work, and competent co-laborers.

But it is said that this rule imposed upon the telephone company, as a matter of law, the duty of inspecting and testing the guy-wires, or the circuit-breakers of the electric railroad company, and that it is apparent that that duty was not placed upon the telephone company by the trial court.

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There is no such absolute requirement of law. Whether the employer or the employee should discharge such duty must depend upon the circumstances of each particular case. In many instances either may properly perform that work; and in some cases who should perform that duty is a question of fact to be determined by a variety of circumstances, such as the nature of the task of inspection, the skill, opportunity, and means of the workman to properly do it, and the terms of the contract of employment. *McGorty* v. *Southern New Eng. Telephone Co.*, 69 Conn. 635.

The facts found in the present case clearly show, and the court held, that when in the performance of the work in which they were engaged it became necessary to handle a wire of the electric railroad company, or when a contact with such wire was likely to occur, the duty devolved upon the servant and not upon the master to first ascertain whether such wire was charged with electricity.

As to the negligence of the electric railroad company, the trial court has not decided adversely to the plaintiff. The extent of the injury having been shown, the plaintiff was entitled to a judgment for substantial damages against the defendant who should fail to show either that it was not negligent, as alleged, or that the injury was the result of the contributory negligence of the deceased. *Sprague* v. *New York & N. E. R. Co.*, *supra*.

In its effort to show that it was free from fault, the defendant electric railroad company failed. From the facts found the trial court evidently, and we think justly, concluded that the electric railroad company, "in the construction and operation of the appliances" for using in the public streets an agency so dangerous to human life, did not take the required precautions for the safe treatment of such an agency, and "for providing against all dangers incident to its use." *McAdam* v. *Central Ry. & Elec. Co.*, *supra*. But unless the court erred in holding that Delaney was guilty of contributory negligence, the plaintiff would gain nothing by a decision that both the defendants were negligent. That is the controlling question in the case, and unless the ruling of the

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court below upon that point ought to be reversed, it seems unnecessary to consider the other questions raised by plaintiff's counsel.

The complaint alleges that it was not Delaney's "business" to know the unsafe condition of the guy or span-wire. It is found by the court that in "doing work which is dangerous by reason of the possible contact of the telephone wire with the highly charged wires of the street railway or other companies (and this, the record shows, is work which the linemen of the telephone company are frequently required to perform), the linemen do their own testing;" that they know that there are no others employed by the telephone company to do such testing, and that they are supplied with suitable appliances for testing such wires. Delaney was an experienced lineman, acquainted with the duties and dangers of his employment. As against the telephone company, his negligent failure to perform one of the duties of his employment must defeat a recovery for an injury caused by such failure.

The relation of Delaney to the electric railroad company was different. As he was not their employee he was under no contract duty to test their wires or circuit-breakers. Under different circumstances he might have assumed that the electric railroad company was performing its duty, and using suitable and safe appliances to prevent the escape of electricity from the main, or trolley wire, to the guy-wires. But when the accident happened he knew, as an experienced lineman, that such was not the fact, and that it was unsafe to act upon such a belief. He had been expressly warned of the danger of a contact with wires of this kind. Two instances upon this same work, of damage caused by the escape of electricity to the telephone wires by reason of defective circuit-breakers, had been called to his attention, and a fellow workman but a day or two before this accident pointed out to him this particular guy-wire as one from which he had himself just received a shock. With such knowledge and after such warning Delaney heedlessly pulled the wire, which he was coiling, from the arm of the telephone pole, in such a manner that it would obviously fall, as it did, upon the guy-wire, and when,

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as the court finds, it would have been easy for him to have thrown the wire from the pole so as to avoid contact with the dangerous guy-wire.

The defendant electric railroad company can be only liable in this action for an injury caused by its negligence, to one who was himself in the exercise of ordinary care. Its negligence did not excuse Delaney from exercising such care to avoid an injury. Applying that test to the conduct of Delaney, namely, the care which a person of ordinary prudence and judgment should have exercised under similar circumstances—and we have no reason to think that any different standard was applied—the trial court has found he was not in the exercise of due care, as alleged in the complaint, and that his negligence essentially contributed to cause his injury. This conclusion of the court is final. *Peltier* v. *Bradley D. & C. Co.*, 67 Conn. 42. Were it reviewable we should say it was fully sustained by the facts found.

The action of the court in receiving the evidence offered to prove a discharge by the plaintiff, before he was appointed administrator, of the cause of action against the telephone company, could not have harmed the plaintiff. The court very properly refused to hold that the facts proved constituted a release. *Camden* v. *Fletcher*, 4 Mee. & W. 378; *Taylor* v. *Moore*, 47 Conn. 278. Had the court held that such facts constituted a release of the alleged cause of action, the record shows that by reason of the contributory negligence of Delaney there was no cause of action which could have been discharged.

Manifestly the plaintiff was not prejudiced by the rulings of the court in permitting the hypothetical question to Boynton; in admitting the notice which had been served upon the electric railroad company, and in excluding proof of the declarations of Butler. We think these rulings can be sustained; but assuming that they were erroneous, as the plaintiff's right to recover more than nominal damages is defeated by Delaney's contributory negligence, and as these rulings could not have affected the trial or decision of that question, the plaintiff was not injured thereby and we have no occasion to discuss them further.

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We have considered all the questions which we think are involved in the rulings and decision of the court below. At least twenty of the twenty-seven reasons of appeal assigned, seem to be unnecessary for the proper presentation of those questions in this court.

There is no error.

In this opinion the other judges concurred.

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HIRAM JACOBS, TREASURER, *vs.* JOHN H. HOLGENSON ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action to recover the amount of a liquor license bond the plaintiff alleged that the licensee was duly convicted of "selling and exposing for sale on Sunday," etc., in violation of § 3097 of the General Statutes, "as amended by the Public Acts of 1895." The record of such conviction was also referred to and made part of the complaint. In this record it appeared that the licensee had been charged with and had pleaded guilty to the commission of two offenses: one of violating the provisions of the Act of 1895, which prohibited giving away liquor in saloons on Sunday, and the other of keeping open on Sunday in violation of the provisions of § 3097. The defendants admitted all the allegations of the complaint, and thereupon the trial court rendered judgment for the plaintiff. *Held:*—

1. That the Act of 1895 did not amend § 3097 of the General Statutes, but created a new and distinct offense, a conviction of which did not work a forfeiture of the license bond.
2. But that the complaint, although defective in form, did, as a whole, substantially allege the conviction of an offense under § 3097 of the General Statutes, and that such conviction worked a forfeiture of the bond.
3. That it was immaterial to the present case whether the sentence in the liquor prosecution was imposed upon one or both counts, or was illegal; inasmuch as the bond was forfeited by the conviction, no appeal having been taken.

A finding of the issues for the plaintiff operates in the same manner upon formal defects in the complaint, as does the verdict of a jury.

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An answer admitting all the allegations of the complaint cannot be treated as a demurrer, so far as formal defects in the complaint are concerned.

[Argued October 26th—decided November 30th, 1897.]

ACTION to recover the amount of a liquor license bond, brought to the City Court of New Haven and tried to the court, *Dow, Assistant Judge*, upon the defendants' admission of the truth of the allegations of the complaint; the court was of opinion that the defendants were liable upon the admitted facts, and rendered judgment against them, whereupon they appealed to this court for alleged errors in the rulings of the trial court. *No error.*

The condition of the bond sued upon, is as follows: "Whereas the above bounden Holgenson has made application to the board of county commissioners of the county of New Haven for a license to sell spirituous and intoxicating liquors in the town of New Haven, in said county: Now if such license shall be issued to the said Holgenson, and the said Holgenson shall comply with all the provisions of sections 3087 to 3101 inclusive, of the statutes under which said license may be issued, then this bond to be void; otherwise, of full force in the law."

Paragraph 3 of the complaint alleges that "said Holgenson was, on the 4th day of December, 1896, in the City Court of New Haven, duly convicted of selling and exposing for sale on Sunday certain spirituous and intoxicating liquors, he not having a druggist's license therefor, in violation of the provisions of the statutes, sections 3087 to 3101 inclusive, under which the license mentioned in paragraph 2 was issued, to wit: in violation of section 3097 of said statutes, as amended by the Public Acts of 1895. A copy of the record of said conviction will be filed in said court at its first opening upon the return day hereof, and marked Exhibit B."

Exhibit B is the record of a prosecution against Holgenson, the complaint in which contains two counts. The first count was for selling and exposing for sale, dispensing, disposing of and giving away certain intoxicating liquors, between the hours of 12 o'clock on Saturday the 24th of October,

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1896, and 5 o'clock on the Monday morning next following; and the second was for keeping open a certain place in which intoxicating liquors were sold and exposed for sale, between the hours of 12 o'clock on Saturday night, the 24th of October, 1896, and 12 o'clock on the Sunday night next following. To this complaint Holgenson pleaded guilty. The judgment recites that the court "finds that the accused is guilty in manner and form as alleged in said complaint," and imposes a fine of $10 and costs of prosecution. From that judgment no appeal was taken.

The defendants' answer to the complaint in the present case, is as follows: "Paragraphs 1, 2, 3, 4 and 5 (being all the paragraphs of the complaint) are admitted." The judgment of the court below recites that the court "finds the issue for the plaintiff," and adjudges that the plaintiff recover of the defendants $300 damages and his costs.

From this judgment the appeal is taken, on the ground (set forth in various forms in the reasons of appeal) that the judgment is erroneous, because it legally appears from the record of the case that the only conviction, if any, alleged and proved, is a conviction for violating the provisions of the Public Acts of 1895; and no conviction for the violation of any provision of §§ 3087 to 3101 inclusive of the General Statutes, is alleged.

Section 3064 of General Statutes provides that each person receiving a license for the sale of intoxicating liquors, shall give a bond with sufficient surety "conditioned for the due observance of all the provisions of sections 3087 to 3101 inclusive." Section 3097 of the General Statutes, and Chap. 251 of the Public Acts of 1895, are given in the foot-note.*

* "Sec. 3097. Every person who by himself, his servant, or his agent, between the hours of twelve o'clock on Saturday night and twelve o'clock on Sunday night next following, shall sell or expose for sale any spirituous or intoxicating liquors, or shall keep open any place of any kind or description in which spirituous and intoxicating liquors are at any time sold or exposed for sale, or are reputed to be sold or exposed for sale, or in which any sports or games of chance are at any time carried on or allowed, or are reputed to be so carried on or allowed, shall be fined not less than fifty nor more than one hundred dollars, or be impris-

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Albert D. Penney and *James Buchanan*, for the appellants (defendants).

Edward G. Buckland and *James D. Dewell, Jr.*, with whom was *Benjamin I. Spock*, for the appellee (plaintiff).

HAMERSLEY, J. If the complaint in this case alleges, and alleges only, the defendant Holgenson's conviction of the offense created by Chap. 251 of the Public Acts of 1895, the judgment is wrong. The obligations of the bond are determined by the statute law as it was on January 1st, 1896. At that time, by force of § 3064 of the General Statutes, the bond would be forfeited if the licensee should be convicted "of a violation of any of the provisions of sections 3087 to 3101 inclusive." No one of these sections then contained a provision forbidding the giving away intoxicating liquors between the hours of 12 o'clock on Saturday night and five o'clock on Monday morning next following; but Chap. 251 of the Public Acts of 1895 creates such an offense, which is similar to one of the offenses defined in § 3097; and it is claimed by the plaintiff that this Act should be construed as if it said: "Section 3097 is amended so as to read as follows" (incorporating therein the new offense in place of the similar offense defined in the section as originally enacted).

Such construction is not allowable. The Act of 1895 is an independent Act; it does not purport to be in addition to, or amendment of, or repeal of, any prior Act or part thereof. Whether the new offense is so defined as, by implication, to

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oned not more than six months, or both; but this section shall not apply to sales under a druggist's license."

Chapter 251 of the Pub. Acts of 1895. "Every person who, by himself, his servant, or his agent, between the hours of twelve o'clock on Saturday night and five o'clock on Monday morning next following, in any place of any kind or description in which spirituous or intoxicating liquors are at any time sold or exposed for sale, or are reputed to be sold or exposed for sale, shall dispense, dispose of, or give away any spirituous or intoxicating liquors, shall be fined not less than fifty nor more than one hundred dollars, or be imprisoned not more than six months, or both; but this act shall not apply to sales or transactions under a druggist's license."

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repeal the provision relative to the similar offense contained in § 3097, is immaterial; that section is not amended by including the new offense within its provisions, and therefore a conviction of that offense cannot work a forfeiture of the bond.

The complaint, however, does allege Holgenson's conviction of a different offense, to wit, keeping open, between the hours of 12 o'clock on Saturday night and 12 o'clock on Sunday night next following, a place where intoxicating liquors are sold. This is admittedly a conviction of the violation of one of the provisions contained in § 3097, and within the condition of the bond.

The defendant urges that in paragraph 3 of the complaint this conviction is defectively alleged. The record of the conviction is a part of paragraph 3, and by including that record in the paragraph the pleader alleges, inferentially at least, that Holgenson was charged in one prosecution with two offenses, to wit: the offense of violating the provisions of the Act of 1895 in the first count, and of violating one of the provisions of § 3097 in the second count; and that by his plea of "guilty" he was convicted of each of these distinct offenses. The pleader also in general terms defines the offense of which Holgenson was so convicted, inaccurately and in language of doubtful meaning, especially in connection with the legal conclusion alleged, that the Act of 1895 was an amendment to § 3097. Paragraph 3 is plainly open to demurrer. We think, however, that the defects are matters of form rather than of substance, and that the paragraph as a whole does substantially allege that Holgenson was convicted of the violation of the provisions of § 3097 specified in the record of conviction, which is made a part of the paragraph. Such formal defects are healed by verdict. *Griffin* v. *Pratt*, 3 Conn. 513, 515; *State* v. *Ryan*, 68 id. 512, 517. And the finding of the court below, recited in the judgment, that "the court having heard the parties finds the issue for the plaintiff," must operate in the same manner. The defendants might have demurred, and in that case the defects could have been cured by amendment. In answering by a specific ad-

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mission of each allegation in the complaint, they have waived their right of objecting to formal defects as effectually as if they had answered by denial; they cannot now limit the effect of their admissions as evidence upon which the court may act in finding the issues for the plaintiff. *Conn. Hospital for Insane* v. *Brookfield*, 69 Conn. 1, 5. The law requires all demurrers to distinctly specify the reasons why the pleading demurred to is insufficient, and cannot be evaded by treating an answer admitting each allegation as a demurrer to formal defects.

The defendants further urge that the record of conviction indicates that the Police Court regarded the complaint before it as charging a single offense; and that the sentence is illegal if treated as a punishment for more than one offense. The formal finding of the judgment is "that the accused is guilty in manner and form as alleged in said complaint." This is conclusive. It is immaterial to the present case whether the sentence was imposed on one or both counts, or is illegal. The bond was forfeited by the conviction, unless an appeal was taken. By the terms of § 3064 the forfeiture took place after the plea of guilty was entered, when the time limited for giving notice of appeal expired. *Quintard* v. *Knoedler*, 53 Conn. 485, 487.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

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THE FOSKETT AND BISHOP COMPANY *vs.* WALTER S. SWAYNE ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A nonsuit ought not to be granted in cases tried either to the court or to the jury, if substantial evidence is produced by the plaintiff in support of his cause.

In an action against husband and wife to foreclose a mechanic's lien, the plaintiff offered evidence that the wife owned the house upon which the improvements were made, that she took part in selecting the materials, gave directions concerning the work, in some instances countermanded the orders of her husband, and at times evinced an expectation to pay for the labor and materials. *Held* that upon this evidence judgment might reasonably have been rendered against the wife, and that such evidence, at all events, should have protected the plaintiff from a nonsuit.

[Argued October 27th—decided November 30th, 1897.]

ACTION to recover the value of labor and materials and to foreclose a mechanic's lien therefor, brought to the Superior Court in New Haven County and tried to the court, *Robinson, J.*, by whom a judgment of nonsuit was rendered against the plaintiff as to the defendant Sarah Swayne, from which the plaintiff appealed for alleged error of the court in refusing to set aside said judgment. *Error and nonsuit set aside.*

The case is sufficiently stated in the opinion.

Prentice W. Chase and *James Elliott*, for the appellant, (plaintiff).

James Kingsley Blake, for the appellee (New Milford Sav. Bk.)

Richard H. Tyner, for the appellee (Sarah Swayne).

ANDREWS, C. J. Any court is authorized by § 1109 of the General Statutes to grant a motion for a judgment as in

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case of a nonsuit, if in its opinion the plaintiff has failed to make out a *prima facie* case. In *Booth* v. *Hart*, 43 Conn. 480, 484, this court said: "In cases tried to the jury we have established the rule, that if there is substantial evidence produced by the plaintiff in support of his cause, which should be weighed and considered by the jury, a nonsuit ought not to be granted. And we think the same rule should be applied in cases tried by the court." This rule has been elaborated and applied in later cases. *Cook* v. *Morris*, 66 Conn. 196, 210; *Thames Steamboat Co.* v. *Housatonic R. Co.*, 24 id. 40, 49; *Canton* v. *Burlington*, 58 id. 277, 279.

It appears that the land sought to be foreclosed belonged to the defendant Sarah Swayne, to her sole use, and that she is the wife of Walter S. Swayne. The plaintiff had furnished materials and rendered services in the construction of a house which stood on that land. It was entitled to have a judgment to foreclose the lien on her land, provided the materials so furnished and the services so rendered were furnished and rendered by virtue of an agreement with her, or by her consent, or by an agreement with, or the consent of some person having authority from or rightfully acting for her. General Statutes § 3018. What constitutes consent, within the meaning of this statute, is discussed in *Huntley* v. *Holt*, 58 Conn. 445, 449, and *Lyon* v. *Champion*, 62 id. 75, 78.

It seems to us that there was evidence given by the plaintiff from which the court might fairly have found that the defendant, Sarah, had given her consent to the furnishing of the materials and the rendering of the services by the plaintiff. The evidence should be deemed to be true; and all those reasonable presumptions which, according to the ordinary course of events, or the ordinary experience of human nature, arise out of the facts proved, should be taken in its favor. Taken with these presumptions we think the evidence might fairly be claimed to show the consent of Mrs. Swayne. She was the owner of the house and knew the improvements were being made thereto by the plaintiff. She knew that these improvements would largely increase its value. This fact alone might possibly authorize a jury to find that she had

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given her consent. *Gannon* v. *Shepard*, 156 Mass. 355. Especially might her consent be inferred when it appeared, as it did, that she had taken part in selecting the materials; that she had given directions concerning the work; that she had in some instances countermanded the orders given by her husband, as though she had the superior authority; that she decided whether certain parts of the work should be done or not done by reason of the cost; and that at times she evinced an expectation to pay for the work and materials.

We do not intend to intimate that the evidence was or was not such that if the case had been submitted by the parties without further evidence, judgment must necessarily have been given for the plaintiff. The only question now is whether there was evidence upon which such a judgment might reasonably have been given, on due consideration. Upon a motion for a statutory nonsuit no opportunity for consideration is given.

There is error; the nonsuit should be set aside and the case stand for trial.

In this opinion the other judges concurred.

THE STATE BANK OF THE CITY OF NEW YORK *vs.* CHARLES R. WATERHOUSE, JR.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The indorsement and delivery of a warehouse receipt transfers the legal title and the constructive possession of the property to the indorsee.

Whether our statute (General Statutes, § 3971) gives to such receipts all the characteristics of negotiable paper, *quære*.

An agreement between a former owner and the warehouseman, that the goods should remain in the warehouse until the purchase price had been paid, cannot affect a subsequent *bona fide* indorsee without notice.

A warehouse receipt provided that certain barrels of whiskey were to be

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delivered upon surrender of the receipt, after the payment of the government tax "and all other amounts due." *Held* that the words quoted referred only to proper warehouse charges, and therefore gave no constructive notice to the indorsee that any lien existed in favor of a former owner for the purchase price of the whiskey.

In the case at bar the warehouseman having paid the government tax upon the whiskey, issued his receipt for the goods with the words "tax paid" stamped thereon. *Held* that as against the plaintiff, an indorsee without notice, the warehouseman was estopped from claiming a lien for the amount of the tax so paid.

Statements claimed to have been made by a bank president concerning the dealings between a firm, in which he was a partner, and an insolvent debtor, are irrelevant upon an inquiry as to the relation which the bank sustained to such insolvent and to his property.

A letter of the plaintiff directing a certain person to make demand upon the defendant for property about to be replevied, is admissible upon the part of the plaintiff to show the agent's authority.

[Argued October 27th—decided November 30th, 1897.]

ACTION of replevin to recover twenty barrels of whiskey, brought to the Superior Court in New Haven County and tried to the court, *Thayer J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The finding of facts is as follows: "2. On August 23d, 1894, the United Growers Company, a corporation organized and existing under the laws of the State of New York, and located and doing business in the city of New York, sold to one J. Librovicz, of said city and State of New York, the twenty barrels of whiskey described in the complaint, and gave him a receipted invoice or bill thereof, Exhibit E, and delivered to him the three warehouse receipts, Exhibits A,* B,

*EXHIBIT A.

THE OLD COLONY DISTILLERIES COMPANY.

No. Bbls. 5.

NEW HAVEN, August 23d, 1894.

Received in our Distillery Bonded Warehouse at New Haven, District No. 2, State of Connecticut, five bbls. Mill River Rye Why., Serial Nos. 9547 to 9551, which were deposited in said warehouse on the day of May, 1891, to be delivered to J. Librovicz after the payment of the United States internal revenue tax and all other amounts due, and the surrender to us of this warehouse receipt. Tax paid, B. H.

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and C and received from him, in payment for said whiskey, the acceptances of said Librovicz for the agreed price and full market value of said whiskey. 3. Said whiskey was manufactured by the Old Colony Distilleries Company, a Connecticut corporation located in New Haven, and prior to said 23d day of August, 1894, had been stored in their distillery warehouse in New Haven. 4. On said day, the time within which the United States internal revenue tax must be paid, according to the condition of said Distilleries Company's bond, having expired, the defendant, who was then the treasurer and general manager of said company, paid said government tax, and said whiskey was thereupon removed from the bonded or distillery warehouse to a public warehouse which said Distilleries Company was then conducting in the same building, in compliance with the laws of this State relating to public warehouses, where it remained until this action was commenced. 5. On said 23d day of August the defendant, acting in behalf of said Distilleries Company, at the request of the United Growers Company, who had become the owners of said whiskey, filled out said warehouse receipts, Exhibits A, B and C, stamped the same with the word 'tax paid,' and delivered the same to said Growers Company. 6. After said warehouse receipts had been delivered by said Growers Company to said Librovicz, as stated in paragraph 2 hereof, said Librovicz indorsed the same in blank and delivered the same to the plaintiff, as part collateral security for a note of $2,000, dated August 29th, 1894, which

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The property mentioned in this receipt is held by us as Bailees only and is not insured by us. This receipt is transferable or negotiable by delivery. Storage to be paid at the rate of eight cents per bbl. per month. THE OLD COLONY DISTILLERIES CO., per CHAS. R. WATERHOUSE, JR., Treas.

(Indorsement).

Deliver M. Zunder & Son, or order.

JULIUS LIBROVICZ.

[Exhibits B and C were like Exhibit A, except that they were for barrels with different numbers. Exhibit D is unimportant. Exhibit E was a receipted bill of sale to J. Librovicz, from the United Growers Company, of all the goods replevied.]

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the bank on that day discounted for him, the proceeds of which he had, and no part of which has ever been paid. 7. On January 22d, 1895, said Librovicz having become insolvent and having absconded, the plaintiff wrote above the indorsement of said Librovicz on said warehouse receipts, the words, 'Deliver M. Zunder & Sons, or order,' and sent said certificates to said Zunder & Sons at New Haven, with directions to withdraw said whiskey from the warehouse, pay storage charges, and ship the whiskey to the plaintiff in New York. 8. Upon the receipt of said warehouse receipts and instructions, Mr. M. Zunder, of the firm of Zunder & Sons, called at said warehouse in behalf of the plaintiff and demanded the delivery of said twenty barrels of whiskey, at the same time showing the defendant the said receipts, and tendering and offering to deliver the same to him and to pay all storage charges on said whiskey. The defendant refused to deliver said whiskey until he should be paid the sum of $900, which he claimed he had paid for taxes to the U. S. government on said whiskey, and until he should be paid, also, the amount which said Librovicz agreed to pay said Growers Company on said whiskey. 9. Said Librovicz never paid said acceptances to said Growers Company, and said company, after the same became due, brought suits against said Librovicz in the City Court of the city of New York, and in January, 1895, obtained judgments against him in said court for the full amount due on said acceptances. 10. Said Growers Company also brought an action against said Librovicz upon the common counts, returnable to the City Court of the city of New Haven, on the first Monday of December, 1894, in which action the Old Colony Distilleries Company was made garnishee, and service of a copy of the writ and complaint in said action was made upon this defendant. No appearance was entered in said action in behalf of defendant or garnishee, no bill of particulars, answer, or other pleadings, were ever filed in said cause, and the said cause now appears upon the docket of said court as still pending therein. 11. Upon the trial the plaintiff called as a witness one J. J. Kennedy, the stamp deputy for the internal revenue collector at the city of

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New Haven, who testified in chief that August 23d, 1894, the defendant called at said collector's office and paid the government tax on the twenty barrels of whiskey in question. Upon cross-examination he was asked the following question: 'Q. And as soon as the tax was paid Mr. Waterhouse removed it, didn't he?' (referring to the removal of the whiskey from the bonded warehouse to the public warehouse). To this question counsel for the plaintiff objected, on the ground that it was irrelevant, immaterial, and foreign to the examination in chief. The objection was sustained. The defendant's counsel duly excepted. 12. The plaintiff offered one Oscar L. Richard, its president, as a witness, who testified that the letter hereto annexed as Exhibit D, was written with his knowledge and by his direction, by J. H. Rosenbaum, cashier of said bank, but now dead; and the plaintiff then offered said letter in evidence, stating that it would be shown by other witnesses that said warehouse receipts were inclosed with said letter and sent to and received by M. Zunder & Sons with said letter. The defendant's counsel objected to the introduction of said letter, as irrelevant, immaterial, and *res inter alios*. The objection was overruled, and an exception duly taken to the ruling by the defendant. The plaintiff afterwards, by Allan Durand, assistant cashier of the plaintiff bank, and by M. Zunder, proved that said letter was sent to Zunder & Sons and received by them, and that the receipts, Exhibits A, B and C, were inclosed with the letter when so sent and received. 13. Said Richard testified in chief to the negotiations which took place between himself as the representative of the plaintiff, and said Librovicz, concerning the loan of August 29th, 1894, above referred to, and the giving of said collateral. Upon cross-examination the witness (who it appeared was a member of the firm of Richard & Company doing a banking and forwarding business, which firm was a creditor of said Librovicz) was asked whether he attended a meeting of the creditors of said Librovicz in New York, which was held October 19th, 1894. The witness answered in the affirmative, when he was asked by defendant's counsel the following question: 'Q. And didn't

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you say at that time (referring to the creditors' meeting) that Librovicz had transferred to you property to the value of more than $100,000 to secure the claim of Richard & Company and the bank, and that if the creditors would give him an extension of three, six, nine and twelve months, that you would turn the property all back?' To this question counsel for the plaintiff objected, on the ground that it was irrelevant, immaterial, and outside the direct examination of the witness. The objection was sustained. Counsel for the defendant duly excepted. 14. One Herman A. Curiel, president and treasurer of said Growers Company, was called as a witness by the defendant, and having testified to certain conversations had by him with said Richard relative to the arrangement between the plaintiff and said Librovicz touching the $2,000 loan and the delivery of Exhibits A, B and C to the plaintiff, he was asked by the defendant's counsel the following question: 'Q. Passing that, then, Mr. Curiel, was any statement made by Mr. Richard at that time with regard to the claim of either himself or the bank against Mr. Librovicz: I do not ask what it was, but I ask first, whether any statement was made about it?' Plaintiff's counsel objected to the question. The court sustained the objection and excluded the question so far as it called for statements made by Richard regarding his own claim or that of his firm. Defendant's counsel duly excepted to the ruling. 15. Defendant's counsel asked said witness, Curiel, this question: 'Q. I think I last directed your attention, Mr. Curiel, to something that was said then at the creditors' meeting, and you made a statement as to what then occurred; now I want to ask you in this connection whether any statement was exhibited of the liabilities and assets of Librovicz?' To this question the plaintiff's counsel objected. Defendant's counsel claimed it was admissible in connection with testimony to be offered as to what Richard had said at said meeting about his and the plaintiff's relations to said Librovicz. The court sustained the objection and excluded the question, but permitted the defendant to give testimony as to all that said Richard stated relative to the plaintiff's claim to said certificates, or its relations to

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and negotiations with said Lobrovicz and its claims against him and his estate. Such testimony was introduced by the defendant, and said Richard was afterwards called by the plaintiff in rebuttal, and was examined and cross-examined as to his statements bearing upon said matters. 16. The defendant, upon the trial, claimed that the plaintiff, being at most but a pledgee of said warehouse receipts, had no such title as would enable it to maintain this action of replevin, and asked the court so to rule. He also claimed that said warehouse receipts bore upon their face notice that there were claims upon said whiskey, and that the plaintiff received said receipts with such notice that there were unsettled claims against and liens upon said whiskey, and that whatever rights the plaintiff acquired by virtue of the transfer of said warehouse receipts to it, said receipts were subject to all the equities between the parties, and that the plaintiff was not entitled to the immediate possession of said whiskey until said claims were all paid and satisfied; and he asked the court to rule that at the date of the plaintiff's demand, and at the commencement of this action, the defendant still held a lien upon said whiskey for the money advanced for the payment of the United States tax as aforesaid; and that the United Growers Company still had a lien upon said whiskey for the purchase price thereof; and that said whiskey was still subject to said attachment and the attachment lien thereof; and that until said liens were discharged and satisfied and said attachment released, the plaintiff could not maintain this action. 17. The court did not rule as thus requested, but ruled that the defendant had no lien upon said whiskey, valid as against the plaintiff, for said tax; that said Growers Company had no liens for the purchase price of said whiskey, good as against the plaintiff; that said pretended attachment of said whiskey in the hands of the defendant, by garnishee process, was void, because neither party to the action resided in New Haven, and, if not void, constituted no lien upon said whiskey, valid against the plaintiff; and that upon the tender to the defendant of said warehouse receipts and the storage charges as aforesaid, the plaintiff was entitled to the immediate possession of said goods."

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Subsequently the trial court found the following additional facts: "(*a*) Upon the trial the defendant offered evidence tending to prove that there was an understanding between the Growers Company and the defendant, at the time said tax was paid and said whiskey removed from the bonded warehouse to the free warehouse, that the same should remain in the said free warehouse until said Growers Company should pay the amount of said tax, and that Librovicz, at the time of his purchase of said whiskey from said Growers Company, had knowledge of said arrangement. (*b*) The defendant also offered evidence tending to prove that at the time of said purchase of the whiskey by Librovicz from said Growers Company, it was agreed between them that the same should remain in said warehouse as collateral security for the payment of the acceptances given as aforesaid in payment therefor, and that subsequently the defendant had notice of this agreement and instructions from the Growers Company to hold the whiskey until the amount should be paid. (*c*) To all the evidence thus offered the plaintiff objected; but by agreement of the parties the evidence came in subject to the objection, to be ruled upon at the close of the trial, the party ruled against to be allowed an exception. (*d*) The evidence so objected to was not contradicted, and from it I find the facts which said evidence, as above stated, tended to prove, to be proved. I also find from the other evidence in the case that the plaintiff had no knowledge or notice of said facts. (*e*) The court *pro forma* overruled the plaintiff's objection to said evidence, and its exception is granted."

Judgment was rendered for the plaintiff to retain the goods, and for damages and costs; and the defendant appealed.

Charles S. Hamilton, for the appellant (defendant).

On both principle and authority the judgment is erroneous. The maxim "*qui prior est tempore, potior est jure*," is universally applied both in law and in equity. Story on Bailments, § 312. A warehouse receipt is in no sense a promissory note, or what is generally called negotiable commercial paper. *Stein* v. *Rheinstrom*, 47 Minn. 476; *West Bk.* v. *Marion Co.*

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Dis. Co., 89 Ky. 91; *Pike* v. *Greenbaum*, 12 Ky. L. R. 423; *Cole* v. *Tyng*, 24 Ill. 99. A person receiving a warehouse receipt for an existing debt takes it subject to the equities between prior parties. *Vogelsang* v. *Fisher*, 31 S. W. 13. There can be no question but that the words printed in Exhibits A, B and C, "after the payment of the United States internal revenue tax and all other amounts due," are sufficient to put the taker of the receipt upon guard that there are prior equities between other parties, subject to which the taker of the receipt must hold the property. Dan'l on Neg. Instr. § 795; *Boswell* v. *Goodwin*, 31 Conn. 74. The plaintiff as pledgee cannot maintain this action. Wells on Replevin, § 94. The rulings of the court upon questions of evidence were erroneous and prejudicial to the defendant.

James H. Webb, with whom was *Siegwart Spier*, for the appellee (plaintiff).

Except for certain statutory provisions that have been enacted in many States, warehouse receipts are not *strictly negotiable*. They are regarded by the authorities like bills of lading, as *quasi-negotiable*. *Bank* v. *R. Co.*, 13 N. Y. 627. The transfer of a warehouse receipt or a bill of lading, accompanied by a sale or pledge of the property described, will have the same legal effect as the actual delivery of the property itself. *Western Union R. Co.* v. *Wagner*, 65 Ill. 197. The sole and only question presented by this record at all worthy of a moment's consideration, is this: Did the plaintiff take these receipts charged with any knowledge or notice of the claimed liens for government tax or purchase money? So far as the tax is concerned there can be no question; for the defendant stamped the words "tax paid" with his own hand on the receipts. The words "all other amounts due," undoubtedly relate only to the special and particular charge mentioned at the bottom of the receipt, namely: "Storage to be paid at the rate of eight cents per barrel per month." The particular statement therein governs and limits the general statement. Had it been the intention of the parties that

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these receipts were issued subject to a lien for the purchase money, that fact could easily have been evidenced by a definite statement upon the receipts themselves. The rights of third parties who have taken warehouse receipts in the various transactions of commerce have received careful consideration in the following cases: *First Nat. Bank* v. *Dean*, 137 N. Y. 110; *Armour* v. *Michigan Central R. Co.*, 65 id. 111; *Gibson* v. *Stevens*, 8 How. 384; *McNiel* v. *Hill*, 16 Fed. Cases, No. 8914; *Western Union Ry. Co.* v. *Wagner*, 65 Ill. 197; *Cleaveland* v. *Shoeman*, 40 Ohio St. 176. See also *Whitlock* v. *Hay*, 58 N. Y. 484; *Voorhees* v. *Olmstead*, 66 N. Y. 113; *Fourth Nat. Bank* v. *St. Louis Cotton Compress Co.*, 11 Mo. App. 333; *Chicago Dock Co.* v. *Foster*, 48 Ill. 507. Upon the delivery to the plaintiff of the warehouse receipt by Librovicz, the plaintiff became invested with a special property in the twenty barrels of whiskey, and the right to demand their "immediate possession." Gen. Stat., § 1323. The rulings upon evidence were too manifestly correct to require argument.

ANDREWS, C. J. The plaintiff being the indorsee and holder of the warehouse receipts was the owner of the goods described therein. Such a receipt is regarded as representing the goods described in it; and an assignment of the receipt by an indorsement of it is, in the eye of the law, considered as equivalent to a delivery of the property itself. These receipts transferred to the plaintiff the legal title to the property and its constructive possession; and the defendant, as the warehouseman, from the time the plaintiff received the receipts, became its bailee and held the property for it. The delivery to it of the evidence of title was equivalent, in the then situation of the property, to the delivery of the property itself. *Gibson* v. *Stevens*, 8 How. 384, 399; *First Nat. Bank* v. *Dean*, 137 N. Y. 110; *Cushing* v. *Breed*, 14 Allen, 376, 380; Jones on Pledges, § 280; 28 Amer. & Eng. Ency. of Law, 673; *Burton* v. *Curyea*, 40 Ill. 320; *Harris* v. *Bradley*, 2 Dill. 248; *Young* v. *Lambert*, L. R. 3 P. C. 142; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; 1

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Smith's Leading Cases, Part 2, p. 1197. Our statutes, § 3971, establish this general law as the law of this State.

It is unnecessary to discuss whether or not our statute gives to this kind of receipt the character of full negotiability. We leave that until the case may arise. The plaintiff was, in any aspect, sufficiently the owner of the goods replevied to be entitled to the immediate possession of the same, unless there was enough in the claim made by the defendant to deprive it of such right. The defendant claimed that there was an agreement between him and the Growers Company, to which Librovicz assented, that the whiskey should remain in the warehouse until the money he had advanced to pay the United States revenue tax thereon should be repaid to him; and that there was an agreement by Librovicz with the Growers Company, that the whiskey should remain in the warehouse until the purchase price was paid, and that he, the defendant, had been instructed by the Growers Company to hold the whiskey until these amounts should be discharged. It is found as a fact that the plaintiff had no knowledge of these agreements. We think, therefore, that the plaintiff cannot be affected by them. It would violate the character of these receipts to hold otherwise.

The defendant also claimed that the plaintiff had constructive notice of these liens, by the language of the receipts themselves; that as the receipts provided that the whiskey was to be delivered to Librovicz or his order "after the payment of the United States internal revenue tax *and all other amounts due*," the plaintiff was informed that some amounts were due which he was to pay, besides the revenue tax. We do not so understand this language. We think the "other amounts due" could only be held to mean proper warehouse charges; as, for instance, the storage charges. And here again the character of these receipts and the purpose for which they were intended forbids any such claim as is made by the defendant. Besides, it seems to us that the defendant and the Growers Company are estopped to make any such claim: the Growers Company by their unconditional bill of sale, and the defendant by the receipt which he had himself

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stamped with the words "tax paid" and then issued. *M'Neil* v. *Hill*, 1 Wool. (U. S.) 96; *Van Santen* v. *Standard Oil Co.*, 81 N. Y. 171; *Fourth Nat. Bank* v. *St. Louis Cotton Compress Co.*, 11 Mo. App. 333.

The question asked of the witness Kennedy was properly excluded. It was not cross-examination. The same may be said of the questions asked of the witness Richard, as set forth in paragraph thirteen of the finding. The witness had not in chief testified as to any such matter.

The matter in respect to which the witness Curiel was interrogated, as described in paragraphs fourteen and fifteen of the finding, seems to us to have been one with which the plaintiff was not connected. It was between other parties. The letter, Exhibit D, was properly admitted. It was a part of the plaintiff's case. It was a part of the evidence to show the authority of M. Zunder & Sons, as agents of the plaintiff, to demand the whiskey of the defendant.

There is no error.

In this opinion the other judges concurred.

JOHN P. LAWLOR *vs.* PATRICK HOLOHAN ET AL.

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Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN and HAMERSLEY, Js.

Under the well settled rule of construction in this State a devise over, provided the first devisee should "die without issue," takes effect only when the first devisee dies without issue during the lifetime of the testator; unless, indeed, a contrary intent is sufficiently declared in the will.

Expressions in the will in question reviewed, and *held* not to indicate a contrary intent upon the part of the testator.

[Submitted on briefs Oct. 27th—decided Nov. 30th, 1897.]

SUIT to determine the title to real estate under Chap. 66 of the Pub. Acts of 1893, involving the construction of the will

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of John Galvin of Waterbury, deceased, brought to the Superior Court in New Haven County and tried to the court, *Hall, J.*, where judgment was rendered for the defendant Catherine Holohan, from which the plaintiff appealed for alleged errors in the rulings of the court. *Error and judgment reversed.*

The case is sufficiently stated in the opinion.

Edward F. Cole, for the appellant (plaintiff).

James E. Russell and *John F. Holohan*, for the appellee (defendant).

TORRANCE, J. John Galvin made the will in question, in 1889, and died in 1894. He left surviving him, as his next of kin, one daughter, Catherine Holohan, a married woman, one of the defendants, certain children of said daughter, and the plaintiff John P. Lawlor, son of a deceased daughter. John P. Lawlor, the grandson, "is and ever has been childless." The questions in the case arise under the ninth clause of the will, which reads as follows: "I give and devise to my grandson, John P. Lawlor, all my real estate on Union street; also all the land on the south side of Ray street on the Abrigador; also a piece of land fronting on the extension of Wall street, running west one hundred feet from the stone wall dividing the front meadow from the pasture land, said land to extend one hundred and ten feet northerly, and to be the width in rear as in front, that is, one hundred feet; also fifty feet on the new street now running in front of John Mulville's land, said land to extend westerly on Mulville's land to the stone wall, and to be the same width in rear as in front, namely, fifty feet, said land to have the use of a passway forty feet wide, running southerly from where the street now ends to the south side of his lot, the same to be to said John P. Lawlor, subject only to this condition, viz: should the said John P. Lawlor die without issue, then this above real estate hereinbefore described, with the rents and profits which may have accumulated therefrom, shall become the estate and

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shall vest in my daughter, Catherine Holohan, to her and her heirs forever; but should the said John P. Lawlor die leaving issue, then said above described real estate shall vest in said issue absolutely." A codicil subsequently enlarged the lot given above to John P. Lawlor "on a new street running in front of John Mulville's land," from a lot fifty feet in width front and rear to a lot one hundred feet in width front and rear.

The will consists of ten clauses in all. In the first the testator merely directs that his debts shall be paid. In the second, third and fourth, he makes specific gifts to a granddaughter, a grandson and a niece, of a picture, his watch and chain, and two hundred dollars, respectively; and said two hundred dollars is, in a codicil, subsequently given to the plaintiff. In the fifth clause he gives the plaintiff certain personal property, including some of his household furniture, and in the sixth he gives all the rest of his household furniture to Mrs. Holohan. In the seventh clause as changed by a codicil, he gives to the plaintiff the use of the barn with carriage-house and sheds adjoining, on the homestead of the testator, rent free, for the term of two years after the decease of the testator. In the eighth, he devises to his daughter Mrs. Holohan, his homestead, the land on Ray street on the Abrigador, and all his land on Wall street, "fourteen and one half acres, more or less, except three building lots reserved and hereinafter described in my devise to my grandson, John P. Lawlor, the same to be to her and her heirs absolutely." In the tenth he appoints the executors.

The grandson, John P. Lawlor, claimed that under the ninth clause of the will he took an estate in fee in the land therein described, while the daughter Mrs. Holohan claimed that he took only a life estate in said land; thereupon the plaintiff brought this action for the construction of the will, making the executor and Mrs. Holohan defendants. The executor disclaimed all interest, and it is admitted by the pleadings that the plaintiff and Mrs. Holohan "are all the persons having any interest or claiming interest in the matters involved in this action."

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The court below, upon these facts, held that under said ninth clause "the plaintiff takes only a life estate in the land therein devised to him," and rendered judgment accordingly; and this action of the court is the only error assigned upon this appeal.

The main question in this case relates to the meaning of this phrase in the ninth clause of the will, "should the said John P. Lawlor die without issue." Does this mean "die without issue" in the lifetime of the testator, or does it mean "die without issue" after the death of the testator? Standing alone it is susceptible of either of these meanings; and unless the will, when properly construed, shows that the testator used it with the second meaning, it should be held that he used it with the first meaning. If any rule to be applied in the construction of phrases of this kind can be settled by repeated decisions, this rule must, in this State at least, be regarded as settled. This rule in substance has been acted upon or recognized in the following cases: *Phelps* v. *Robbins*, 40 Conn. 250; *White* v. *White*, 52 id. 518; *Coe* v. *James*, 54 id. 511; *Phelps* v. *Phelps*, 55 id. 359; *Webb* v. *Lines*, 57 id. 154; *Stone* v. *McEckron*, ibid. 194, 198; *Johnes* v. *Beers*, ibid. 295; *St. John* v. *Dann*, 66 id. 401; *Chesebro* v. *Palmer*, 68 id. 207.

A rule of construction applicable to the language of a will, is a rule of law determining the construction which the courts are bound to put upon particular words, expressions and forms of disposition occurring in wills, in the absence of a sufficiently declared intention to the contrary. Nothing in the will in question shows that the testator used the phrase under consideration in the second of the above meanings.

The only thing that can be said to militate against this view is the provision, immediately following the phrase in question, to the effect that if Lawlor dies, the real estate devised to him, "with the rents and profits which may have accumulated therefrom," shall vest in Mrs. Holohan, the daughter; and it is upon this that the defendant mainly relies. She claims that the rents and profits here spoken of, mean the rents and profits which "may have accumulated"

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after the death of the testator, to Lawlor, and which are uncollected by Lawlor at Lawlor's death. But this seems to be a strained interpretation.

It is conceded by her that Lawlor, on the death of the testator, took at least a life estate in the land devised; and this is clearly so on any view of this will. If this be so, then the rents and profits accumulating after the testator's death belonged to Lawlor, whether collected by him or not. The testator could not dispose of such rents and profits, because, in effect, if Lawlor took a life estate, he had already given them to Lawlor. The rents and profits upon the land described in the ninth clause of the will, "which may have accumulated" up to the time of the testator's death, he could give away, for they were his own; and it seems to us that the more reasonable construction of this part of the will is that he meant those rents and profits, and not those which would under the will belong to Lawlor at Lawlor's death. If this be so it is an argument against, and not in favor of, the defendant's claim; for it shows, so far as it shows anything, that the testator was providing against Lawlor's death before, and not after, the testator.

We are of opinion that on the death of the testator, John P. Lawlor took an estate in fee in the land devised to him, and that the court below erred in holding otherwise.

There is error, the judgment is set aside and the cause remanded to be proceeded with in accordance with this opinion.

In this opinion the other judges concurred.

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WILLIAM B. BROOKS *vs.* EUGENE A. BENHAM ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A debt fully secured by mortgage upon a tract of land which is afterwards divided and sold in several parcels at one time to different purchasers, should, as between them, be so apportioned that each parcel will bear its fair share of the whole debt. The mortgagee ought not to release his security as to any parcel in such a manner as to increase the burden on the rest; and if he, with notice of the conveyances out of which the purchasers' equities arise, sees fit to release any parcel for less than its full share of the whole debt, he will, nevertheless, be chargeable in equity with the receipt of that share, in favor of the owners of the other parcels, in a suit to foreclose the mortgage.

An oral offer by a mortgagee, at an auction sale of the mortgaged premises, to let certain sums "remain" on each parcel of the tract sold, does not constitute an apportionment of the mortgage incumbrance. Unless accepted, such offer amounts to nothing; and if accepted it can be made obligatory, in view of the statute of frauds, only by conveyances between the parties.

An apportionment of the mortgage incumbrance made between the mortgagee and purchasers of certain parcels of the mortgaged tract, cannot affect purchasers of other parcels who were not consulted and gave no consent.

At common law and by the general principles of equity, a mortgage debt is not satisfied by the mere acceptance of a conveyance of the equity of redemption in a part of the mortgaged premises.

If the time limited for redemption expires pending an appeal to this court, the trial court has jurisdiction to modify its decree and fix a new law day.

[Submitted on briefs October 27th—decided November 30th, 1897.]

SUIT to foreclose two mortgages, brought by appeal to the Superior Court in New Haven County where judgment was rendered, *G. W. Wheeler, J.*, for the plaintiff, from which the defendants appealed for alleged erroneous rulings. *No error.*

The report of the committee which was accepted by the court, stated the following facts:—

Eugene A. Benham, in 1886, to secure his note for $4,500

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mortgaged a ten acre tract of land in Waterbury to the plaintiff. It had been mapped out into 28 building lots, and shortly after the mortgage the map was recorded in the Waterbury land records. A street called Benham street was marked on the map, on which some of the lots were bounded. This street was never accepted by vote of the town, but houses were afterwards built along it, and it was used as a highway. The plaintiff afterwards released three of the lots to the mortgagor, describing them as bounded on Benham street or "a new street." In 1890, the defendant, to secure another note for $1,800, mortgaged the residue of the tract to the plaintiff. The land covered by this second mortgage was then worth $10,220. A few months later the plaintiff released two more lots worth $975, to Benham, who thereupon paid him $500, in reduction of the second mortgage.

In 1892, Benham made an assignment in insolvency, and the trustee sold his equity of redemption at auction, having first endeavored, without success, to induce the plaintiff to apportion the amount due him among the several lots. The plaintiff attended the auction, at which the equity in each lot or group of lots was sold separately, and named to the auctioneer, as each lot or group of lots was put up, the amount which he was willing to allow to remain on that land if the purchaser desired, which sums the auctioneer thereupon stated to those present. These sums amounted in all to $6,700, which was a little more than was then due the plaintiff; his intention in fixing the amount being to make his security good and avoid a redemption of the property. The auctioneer did not state the total amount due on the mortgages, and there was no promise, express or implied, on the part of any purchaser to pay them or any part of them. They were on record, and the deeds to each purchaser described his lot as subject to several mortgages which fully appeared of record. The value of each lot is as hereinafter stated, and has remained the same from the sale of the first mortgage to the present time.

The sum which it was stated could remain on Lot 1 was $3,000. This lot was only worth $2,300, and the equity was

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bought in for $1 in behalf of Benham, and conveyed by the purchaser to Mrs. Benham. Lot 2 was worth $600, and it was stated that $500 would remain on it. The purchaser afterwards sold it to Mrs. Benham.

In 1893 and 1894, the plaintiff released his lien on 16 of the lots to their respective purchasers, on their paying to him the several amounts which the auctioneer had stated could remain on them respectively. He also took in 1894 from the purchasers of 5 other lots quitclaim deeds of their title, and several months afterwards gave to each his bond to sell and convey his lot to him for the amount which the auctioneer had stated could remain on it. From the purchaser of each of the other lots, the plaintiff received either the amount which it had been so stated could remain upon it or a conveyance of the equity as payment of said amount.

The sums which it was stated by the auctioneer could remain were as follows: Lots 1, $3,000; 2 and 3, $500, each; 5, 7, 9, 11 to 18 inclusive, 24 and 25, $150 each; 19, 20, 22, 26, 27, 28, together, $500.

Mr. and Mrs. Benham were the sole defendants. The complaint, after reciting the original mortgages, stated that she had received a conveyance of lots 1 and 2, and that on all the remainder of the land originally mortgaged, the mortgages had been released or the amount due thereon paid.

She filed a cross-complaint, alleging that both mortgages had been fully paid off before Benham's insolvency, and that the plaintiff had taken possession of all the lots except those owned by her, and from proceeds of sales and rents had received more than his mortgage debts. She claimed an account and a release, if the plaintiff had been thus paid in full, and if not, a release on his paying such proportion of the remaining indebtedness as the value of her lots bore to the value of all the land mortgaged.

The report left it for the court to determine whether, upon the foregoing facts, what was said and done at the auction sale constituted an apportionment of the mortgage incumbrances, binding upon the defendant.

The court held that Benham street had been released from

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any mortgage liens by the acts of Benham and the plaintiff in dedicating it to public use; that there was no apportionment at or before the auction sale; that each lot must bear its proportional part of the mortgage indebtedness, those released bearing their part as it might exist at the time of the release; that the several payments to the plaintiff, for each release, must be applied in reduction of his mortgage debt, and if less than the proportional part of that debt which they ought, in view of their real value, to have borne, that he should be charged enough more to make up the deficiency; and that when the plaintiff secured the equity in certain of the lots without the consent of the owners of the equities in the other lots, he by his conduct released the remaining lots from the burden of the mortgages to the extent of the then value of those lots which he himself obtained, and the remaining lots were to be charged only with the balance thereafter remaining due under the mortgages.

Judgment was therefore rendered for the plaintiff, fixing the amount of his mortgage debts at $2,087.55, ascertained as follows: The land mortgaged was worth, at the date of Benham's insolvency, $10,220—$975=$9,245. There was then due on the mortgages, exclusive of accrued interest, $4,500+$1,800—$500=$5,800. Lots 6 and 8 were released August 22d, 1893, on receipt of $400. They were worth $700. At that date the mortgage debt, including interest accrued, was $6,371.30. Therefore these lots were then equitably subject to a part of the debt (=x) proportioned to the ratio between their value ($700) and the value of all the lots mortgaged. This proportion is thus stated: x : $6,371.30 : : $700 : $9,245. The part of the debt thus ascertained ($482.41) being charged against the plaintiff, his debt was reduced not simply by the $400 which he in fact received, but by the $82.41 additional, to which these two lots, as related to the rest of the mortgaged lands, were equitably subject.

The mortgage lien existing after this transaction on August 22d, 1893, was therefore for $6,371.30—$482.41=$5,888.89, and the value of the lots on which it rested was $9,245—$700=$8,545. Lots 11 and 13 were released September 5th,

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1893, on receipt of $300. They were worth $500. The mortgage debt, including interest, was then $5,903.63. The proportional burden of this debt resting on these lots (= x), ascertained by the same rule (x : $5,903.64 : : $500 : $8,545), was $345.44, or $45.44 more than the sum paid. The plaintiff was therefore charged with $345.44, which left his debt $5,558.19, resting upon lots worth ($8,545—$500)=$8,045.

Similar rests and computations were made for each successive payment and release, and the lots to which the plaintiff acquired the absolute title in 1894 were charged against him at their full value, which exceeded what would then have been their proper contributory share of the mortgage debt.

The following claims of the defendants were overruled by the court: That the plaintiff's mortgages have been apportioned among the several lot owners, and therefore nothing remained due on these mortgages; that the releasing of any of the lots was an apportionment of the mortgages, and therefore nothing remained due on these mortgages; that the release of one or more of these lots without an appraisal as provided by the statutes was equivalent to and was in fact a foreclosure of these mortgages upon that lot or parcel, and therefore nothing remains due on these mortgages; that the value of the lots thus foreclosed or appropriated by the plaintiff should be charged to the plaintiff in reduction of his two mortgages, that Benham street was not released from the burden of either mortgage, and its value should be taken into account in apportioning said two mortgages; that judgment ought to be rendered for the defendant.

Charles W. Gillette and *John O'Neill*, for the appellant (defendant).

Frederick M. Peasley, for the appellee (plaintiff).

BALDWIN, J. He who takes a mortgage of several parcels of land, which together are worth more than the amount of his debt, and are subsequently sold by the owner of the equity of redemption, at the same time, to different persons, owes a

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certain duty to each of these. He ought not to release his security as to any parcel in such a manner as to increase the burden on the rest. He has no right, without the consent of all, to bargain with any of these purchasers for the release of his parcel, on payment of less than its fair share of the whole debt. While the whole of the debt is secured by the whole of the land, each parcel of the land, as between the different proprietors, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and if its owner should be compelled to redeem the mortgage, he can resort to the others for a ratable contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage incumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril, if he had notice of the conveyances out of which the equities in question arise; and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of that share, in favor of the owners of the remaining parcels. *Stevens* v. *Cooper*, 1 Johns. Ch. 425. It was this position which the plaintiff occupied with relation to the defendants, and the decree appealed from correctly enforces their resulting equities.

It was properly held by the Superior Court that what was said and done at the auction sale did not constitute an apportionment of the mortgage incumbrances. An oral offer was made to let certain sums "remain" on each parcel sold; but such offers amounted to nothing unless accepted, and then could only be made effectual by future conveyances between the parties. It appears that no offer was accepted at the time of the sale, nor, in view of the statute of frauds, would such an acceptance have created an actionable obligation.

The dealings of the plaintiff with certain of the purchasers after the sale, and the resulting conveyances, constituted an apportionment as between him and them; but could not operate to the prejudice of the defendants, who were not consulted and gave no consent.

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The defendants claim that the plaintiff's release of certain of the lots, upon payment of part of the mortgage debt, was equivalent to a foreclosure, and therefore paid the whole debt.

The ancient law of this State was that when a strict foreclosure became absolute, this appropriation of the land extinguished the obligation of the mortgagor, and under our present statutes a similar result may now follow, under certain conditions. *Ansonia Bank's Appeal*, 58 Conn. 257. But these statutes deal only with judicial foreclosures. Such proceedings afford an opportunity to settle all matters of controversy growing out of the mortgage indebtedness, and it is only when the plaintiff does not choose to avail himself of this opportunity that he is debarred from any further recovery in subsequent proceedings. Transactions between the mortgagor and mortgagee out of court, are left to be regulated by the common law and the general principles of equity. Under these a mortgage debt is never satisfied by the mere acceptance of a conveyance of the equity of redemption as to part of the security.

The acceptance by the plaintiff, in February, 1894, of conveyances of the equities of redemption in five of the lots sold by the trustee in insolvency extinguished the lien of the mortgage upon them, and they were properly charged against him by the Superior Court, in stating the account between him and the defendants, at $1,800, which was their market value, although that exceeded their ratable contributory share of the total indebtedness then existing. His agreement, made six months later, to sell them for what he had promised should "remain" upon them, amounting in all to $1,100, cannot affect the fact that he had previously discharged them from the mortgage lien, and appropriated them fully to his own use, without obtaining the defendant's consent.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

At the opening of the next term of this court (January

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term, 1898), an oral motion was made by counsel for the appellants for an order directing the Superior Court to enlarge the time limited for redemption in its original decree of foreclosure, which time expired pending the appeal, and before the judgment of this court was announced.

John O'Neill, for the motion, stated that the clerk of the Superior Court had issued an execution of ejectment upon the original decree, and that he had submitted to the Superior Court a motion for its recall, which was pending undecided.

Frederick M. Peasley, for the plaintiff, urged that the defendants should have tendered the sum found due, or paid it into court, before the law day expired.

PER CURIAM. The Superior Court has jurisdiction to modify its judgment, in respect to the limit of time fixed for redemption, and to the stay of execution.

This court cannot assume, upon this motion, to control the exercise of such jurisdiction.

SUSAN ANDERSON ET AL. *vs.* THE TOWN OF NEW CANAAN.

70 99
72 361

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A statement in the reasons of appeal that the trial court erred in reaching a certain conclusion upon the evidence in the case, is insufficient as an assignment of error, in that it fails to specifically and distinctly point out any error of law.

In a proceeding under § 2674 of the General Statutes, to compel a town to repair certain of its public roads, the question whether such roads are highways or not is one that may be raised by the town and, if raised, must be determined by the trier as incidental to the decision of the main question.

[Argued October 28th—decided November 30th, 1897.]

APPEAL from an order of the county commissioners of Fairfield County requiring the defendant to repair certain

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alleged highways within its limits, taken to the Superior Court in Fairfield County and tried to the court, *Ralph Wheeler, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The complaint, signed and sworn to by Susan Anderson and twenty other citizens of this State, and indorsed and approved by the State's Attorney of Fairfield county, alleged that the defendant town neglected to keep in good and sufficient repair two public roads or highways (describing them) in said town of New Canaan, and that the selectmen failed to remove encroachments of trees and bushes from said highways.

The county commissioners after a hearing had, having ordered repairs to be made, and encroachments to be removed from one of said highways, so that it should be suitable and safe for public travel, and having found that the convenience of the complainants and of the public did not demand so great an outlay as would be required for the proper repair and removal of encroachments from the other, the defendant appealed to the Superior Court under § 2677 of the General Statutes, alleging in said appeal that the defendant was aggrieved by the decision of the county commissioners, in that they found that the highways described in the complaint were public highways; that one of said roads had not been kept in sufficient repair, nor the encroachments removed therefrom; and that the county commissioners had not sufficiently designated said roads, nor the character or extent of the repairs to be made.

Upon the appeal the Superior Court found the following facts: No record evidence of the layout of any of the highways was produced. Complainants offered a number of ancient deeds of lands in which the lands were described as bounded by these highways, evidence of use, and of repair by the town of New Canaan of portions of the ways. The court took a view of the ways. The ways have been used from time immemorial as public highways, have been repaired from time to time in certain places by the defendant town, and are ancient highways. Though not so much or so generally used

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as formerly, they are still much used for heavy teaming in the moving of timber. The Cheese Spring road, southerly from the Anderson house, is now only occasionally used for any other purpose than the one mentioned, while the road running from Groupe's corner easterly to the Wilton line, is used considerably for light carriage driving. The condition of all of the roads has been for years such as to discourage their use. They are much out of repair, and travel over them with carriages or vehicles of any kind is difficult and dangerous. There are deep ruts and gullies; rocks and stones project from the surface, and in places bushes and branches of trees overhang and interfere with the passage of carriages. The Cheese Spring road from the Anderson house southerly, and the road running easterly from the corner near the Anderson house to the Wilton line, as now used, are generally only of the width of an ordinary cart-path. In view of the present use of the highways in question, the court finds that it will be sufficient to put them in a reasonably safe condition, in the manner and to the extent ordered. The town of New Canaan has neglected and still neglects to keep said highways in good and sufficient repair, and said highways ought to be repaired. Public convenience and necessity require their repair to the extent ordered.

Upon the foregoing facts, counsel for the defendant claimed as a matter of law: that the roads described in the complaint were not public highways, and that this was not a proper action in which to determine the question.

The Superior Court also certified up certain evidence taken upon the trial in said court.

Upon said facts the Superior Court, in its order, found said highways described in the complaint to be public highways in the town of New Canaan, and ordered certain described repairs to be made, and certain described encroachments to be removed from certain described portions of both of said highways.

The first error assigned in the defendant's appeal to this court is as follows: The court erred in overruling the defendant's claim of law, *viz:* that upon the evidence in the case

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the ways described in the complaint are not public highways, and that this is not a proper action in which to determine the question as to whether the roads described in the complaint are public highways.

The remaining reasons of appeal relate to alleged errors of the court in finding or refusing to find particular facts.

John H. Light, for the appellant (defendant).

Joseph A. Gray, for the appellees (plaintiffs).

HALL, J. By the first reason of appeal we are asked to decide, first: "that upon the evidence in the case the roads described in the complaint are not public highways," and that the Superior Court erred in not so holding; and second, that this is not a proper action in which to determine whether the roads described in the complaint are public highways, and that the trial court should have so held.

The first part of this reason of appeal presents no question which can be reviewed by this court. It wholly fails to specifically and distinctly describe any error of law committed by the trial court. Apparently, from the record, the principal question upon the trial, and the one upon which the case turned, was whether these roads were highways. This assignment of error is equivalent to a statement that upon the evidence the judgment should have been in favor of the defendant. *Osborne v. Troup*, 60 Conn. 485, 490; *Kimberly et ux. Appeal*, 68 id. 428; Rules of Practice, Chap. 14, § 4, p. 258.

If it can be regarded as a sufficient assignment of either an error of fact or of law, it cannot be considered by this court, for the reason that we have not before us all the evidence upon which the Superior Court decided that these roads were highways. Exhibit A does not purport to be a statement of all the evidence. The record shows that the presiding judge made a personal inspection of the *locus*.

This assignment of error is but an attempt to procure a new trial, by retrying in this court the questions of fact which

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have been tried and decided by the Superior Court. This court cannot for that purpose retry such questions. *Styles* v. *Tyler*, 64 Conn. 432; *Atwater* v. *Morning News Co.*, 67 id. 504; *Neilson* v. *Hartford Street Ry. Co.*, ibid. 466; *Scott* v. *Spiegel*, ibid. 349.

For the purpose of correcting the record, it is unnecessary to refer to those reasons of appeal which are based upon the finding by the court and its refusal to find particular facts. The proper presentation of the only question of law raised by the appeal, namely, whether the county commissioners and the Superior Court might, in this proceeding, decide whether these roads were highways, will not be aided by such correction of the finding. That question is apparent upon the record as it now stands. *Hatch* v. *Thompson*, 67 Conn. 74.

The purpose of this proceeding was not to establish or fix the bounds of highways, but to compel towns to repair existing public ways. If, upon the trial, for the purpose of escaping the duty of repairing a particular road, the town attempts to show that such road is not a highway, as was evidently done in the present case, it becomes the duty of the triers to hear the evidence offered, and to decide that question as incidental to the decision of the main question of the duty of the town to make the desired repairs. By making the claim that the way in question is not a public one, the town cannot defeat the purpose of the statute under which this proceeding was commenced, by compelling the complainants, before obtaining from the county commissioners an order for the repair of the roads, to first, by proceedings under another statute, procure them to be laid out and established as lawful highways.

There is no error.

In this opinion the other judges concurred.

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JOSHUA ROOKEY *vs.* THE STATE OF CONNECTICUT.

Third Judicial District, Bridgeport, October Term, 1897. TORRANCE, BALDWIN, HAMERSLEY, HALL and ELMER, Js.

By the common law of this State the crime of rape necessarily includes the lesser offense of an attempt to commit rape, of which the accused may be convicted upon an information charging the greater crime.

Section 1407 of the General Statutes provides that anyone who shall, "with actual violence, make an assault upon the body of any female, with intent to commit a rape," shall be imprisoned, etc.; and that any person indicted for rape may be convicted of the offense mentioned in that section. *Held* that this section did not create a new statutory offense nor alter the former course of procedure, but merely prescribed a new penalty for an existing common-law offense.

Upon an information in the usual form charging rape, the jury found the accused "guilty of the crime of attempt at rape." *Held* that this was, in legal effect, a verdict finding the accused guilty of "an assault with actual violence upon the body of a female, with intent to commit the crime of rape," as provided in § 1407, and designated with sufficient clearness and certainty the crime of which he was found guilty, under the information.

[Argued November 2d—decided November 30th, 1897.]

WRIT of error to review a judgment of conviction rendered by the Superior Court of Fairfield County, *Andrews, J.*, in a criminal prosecution against the plaintiff for rape, brought to the Supreme Court of Errors holden at Bridgeport within and for the third judicial district, on the fourth Tuesday of October, 1897. *No error.*

The writ recites the material parts of the information, plea, verdict of the jury and judgment in the Superior Court. The information was in the usual form of an information for rape. The verdict and judgment were recorded as follows: "The prisoner appeared and for plea said 'Not guilty,' and after a full hearing the case was committed to the jury, who returned a verdict of 'guilty' of the crime of 'attempt at rape' under the said information. It is therefore considered

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by the court that the prisoner is guilty of the crime 'attempt at rape' under the said information. The court thereupon sentenced the said prisoner to be confined," etc.

The errors specially assigned were, in substance: 1. The court erred in not holding the verdict to be a special verdict and, as such, omitting the essential facts necessary to constitute any offense and to warrant the rendition of any judgment. 2. The court erred in rendering judgment, and in not holding that the verdict was equivalent to a verdict of "not guilty;" because the verdict designated no statutory or common law offense, and did not find the defendant guilty of any offense.

The answer of the State to the writ was "nothing erroneous."

James T. Lynch, for the plaintiff in error.

An "attempt at rape," or "an attempt to commit a rape," was not an offense at common law. *State* v. *Wells*, 31 Conn. 212. A verdict which finds the accused guilty of an act for which he cannot be punished under an indictment, or which omits from its finding any essential legal element necessary to constitute an offense, will not sustain sentence. *Com.* v. *Call*, 21 Pick. 513; *Rhoades* v. *Com.* (Penn.), 6 Atl. Rep. 245; *U. S.* v. *Busso*, 18 Wall. 125; *Nelson* v. *People*, 23 N. Y. 298; 1 Arch. Crim. Pr. & Pl. (8th ed.) 570; *State* v. *Moore*, 31 Conn. 487; *Huffman* v. *State*, 89 Ala. 33; 1 Gra. & Wat. New Trials, 144; 1 Chitty's Crim. Law, 643, 644, and cases cited. If the *assault* was not actually committed and the *intent* did not exist, which the jury impliedly found in the negative, then the offense described in § 1407 of the Gen. Stats. was not committed. 2 Sw. Dig. 414; *Dyer* v. *Com.*, 23 Pick. 403; *State* v. *Wells*, 31 Conn. 212; *Fox* v. *State*, 34 Ohio St. 377; *Brown* v. *State*, 7 Tex. App. 569; *State* v. *Martin*, 3 Dev. (N. Car.) 329; *Nelson* v. *People*, 23 N. Y. 298. In every State where a verdict of "attempt at rape," "assault to commit rape," or "attempt to commit rape" have been held sufficient, they have a general statute against "attempts to commit crime." *In re Lloyd*, 51 Kan. 502; *Cox* v.

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People, 82 Ill. 192; *De Lacy* v. *State*, 8 Baxt. (Tenn.) 401; *Hill* v. *State*, 58 Ga. 126; *Miller* v. *State*, 53 id. 202; *People* v. *Lawton*, 56 Barb. 130; *Young* v. *Com.*, 12 Bush (Ky.), 244; *State* v. *McLaughlin*, 44 Ia. 86; *Slate* v. *Yocum*, 117 Mo. 626. The court erred in not holding and deciding that the verdict of the jury was equivalent to a verdict of "Not guilty," and in sentencing the plaintiff in error. *State* v. *Cox*, *supra*; *In re Ayers*, 123 U. S. 443; *Ex parte Fisk*, 113 id. 313; *Neilson*, *Petitioner*, 131 id. 197; *Ex parte Royal*, 117 id. 241; *Ex parte Kearney*, 55 Cal. 212.

Galen A. Carter, Jr., Assistant State's Attorney, for the defendant.

This whole case lies in a nutshell. Is a verdict of guilty of "attempt at rape," such a verdict as would subject the plaintiff to the penalty prescribed by § 1407 of the General Statutes? What is the definition of "an attempt" in legal parlance? "An intent to commit a crime, and an act done in pursuance thereof which falls short of the thing intended." Anderson's Law Dict. p. 90. An attempt to commit a rape is an offense at common law. 2 Sw. Dig. 324. The expressions "attempt at rape," and "assault with intent to rape," have been used synonymously. 1 Amer. & Eng. Ency. of Law, 936; *Prince* v. *State*, 35 Ala. 369. A former conviction on an indictment for an "attempt to commit a rape," is a good bar to an indictment for a rape. *State* v. *Shepard*, 7 Conn. 54; *State* v. *Nichols*, 8 id. 496; *State* v. *Wells*, 31 id. 212. Even if the verdict could be regarded as a special verdict, the jury necessarily found all the essential facts. Could the jury have found the facts any more specifically by saying "guilty of assault with attempt to rape?" There could not be any "attempt at rape" without an assault.

HAMERSLEY, J. The verdict complained of is not a "special verdict," and so the argument of the plaintiff in error in respect to the requirements of such a verdict is not pertinent to the case. The verdict in a criminal case is either *general*, on the whole charge, or *partial*, as to a part of the

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charge (as when the accused is convicted on one count of an indictment, or upon one part of a count capable of division, or of an offense of inferior degree included in the accusation of a higher crime); or *special*, by which the facts of the case are put upon record and the law is submitted to the court.

The rule that requires a special verdict to state all the circumstances constituting the offense, does not apply to either a partial or a general verdict; both must answer the issues raised by the indictment and the plea, both must state with certainty the general conclusion of guilt or innocence, but neither should detail the facts which support that conclusion. 2 Swift's Dig. 439; 1 Chitty's Cr. Law, 636; 1 Bish. Crim. Proced. § 832. The only special requirement discussed in the books as to the form of a partial verdict convicting one of an offense included in the accusation of a crime of higher degree, is that the verdict shall find the accused not guilty of the greater as well as guilty of the lesser crime. The failure to do so was once deemed by the English law a fatal defect; but the rule was questioned by Chitty as obsolete in his day (1 Cr. Law, 641); and when JUDGE SWIFT in his Digest spoke of the acquittal of the greater crime as necessary to the validity of the verdict, he doubtless had in mind the old rule, and overlooked the more recent authorities cited by Chitty. It is evident that a verdict of conviction of the lesser crime must involve an acquittal of the greater, and that this result should be directly stated; but a failure to do so is not a fatal defect. In the case before us, the crime charged includes the lesser crime of attempt at rape, and the partial verdict rendered is legally equivalent to,—"not guilty of rape, but guilty of attempt at rape."

The claim is made that this partial verdict cannot support any judgment, or should be treated as an acquittal, because the crime of inferior degree, of which the accused might properly have been convicted, is incorrectly described; the only proper description of this crime being "an assault with actual violence upon the body of a female, with intent to commit a rape," using the words of the statute (§ 1407) prescribing the punishment for the crime.

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This claim assumes that § 1407 of the General Statutes does not simply fix the punishment of the common law offense of attempt at rape, but creates a statutory offense previously unknown, whose legal designation must be co-extensive with the statutory definition. Such seems to have been the ground of decision in the Ohio case cited. *Fox* v. *State*, 34 Ohio St. 377. The Ohio criminal code defined the crime of rape. Attempt at rape was not an offense known to the law; but the statute provided that "whoever assaults another, with intent . . . to commit rape . . . upon the person so assaulted, shall be imprisoned," etc. The court held that the statute was the only provision of law making an attempt to commit rape an offense; that the words "attempt to commit rape," having no legal meaning, must have been used in the verdict in their ordinary meaning, and are not "in their ordinary meaning the exact equivalent of the words 'assault with intent to commit rape'." Therefore, in returning a verdict of "guilty of attempt to commit rape," the jury might have convicted the accused of an "attempt" in the ordinary meaning of the word, which was not a criminal offense. From this conclusion BOYNTON, J., dissented. Assuming a similar construction of our statute to be permissible, we think the verdict in the case a valid one.

The principle affecting the form of a general or partial verdict of "guilty" is, that as finally rendered and recorded it shall clearly and certainly designate the crime charged in the indictment, for which punishment is to be inflicted. The general verdict of "guilty," separated from its surroundings, is wholly indefinite; but as actually rendered it is certain. The clerk asks the jury whether the accused is "guilty of the crime whereof he stands indicted or informed against, or not guilty;" and if the foreman answers "guilty," the clerk then says: "Gentlemen of the jury, hearken to your verdict as the court have recorded it. You on your oaths do say that A. B. is guilty of the crime whereof he stands indicted or informed against; so say you all." The assent of the jury to this statement constitutes the actual rendering of the verdict. 2 Swift's Dig. 439; *Watertown Eccl. Society's Appeal*,

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46 Conn. 230, 233; *State* v. *Hoyt*, 47 id. 518, 533. So in the rendition of a partial verdict, the general statement by the foreman, of guilt of the inferior crime, is limited by the assent of the jury to the verdict as stated by the clerk. In this case the verdict assented to by the jury was: "Guilty of the crime of attempt at rape as charged in the information against him;" and the statutory element of "assault with actual violence" being included in the charge referred to, is included in the verdict.

We must assume that in every case this established procedure has been followed, unless the contrary appear from the record. The record before us recites the verdict rendered as "guilty of the crime of attempt at rape under the said information." Such a verdict complies with the essential requirements of clearness and certainty. It is mere trifling to suggest that possibly the jury might have meant that the accused was guilty of some attempt which was not a crime, or which was not an attempt to commit the crime of rape, as charged against him in the information.

We think, however, that our decision should be put on a broader ground, to wit: the language used by the foreman in stating the finding of the jury, "Guilty of attempt at rape," is in itself an appropriate legal form for announcing a conviction of the inferior crime charged in the information, just as truly as the single word "guilty" is the proper form for announcing a conviction of the greater crime.

It is not true that § 1407 creates a new statutory offense. By the common law of this State rape is a crime, and assault with intent to commit rape is a crime; each has a well defined meaning which has not been altered by statute. The latter crime is properly designated either as an "attempt to commit rape," or as an "assault with intent to commit rape." Both names have received the sanction of this court, and each is a correct legal designation of the crime. The foundation of our common law in respect to crimes was laid at the establishment of our commonwealth, in 1639. The English common law as then existing was not adopted here. 1 Col. Rec. 36, 138, 509; Laws of New Haven Colony, 1656, pp. 12, 13; 2 Col.

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Rec. 184; 5 Conn. Hist. Soc. Col. 491; 4 Col. Rec. 412; 6 id. 144; 8 id. 578; 12 id. 423; Preface to Rev. of 1672; Rev. 1750 p. 1; Rev. 1784, ed. 1786, pp. 1, 2, 67; 1 Root, XIII, XIV; *Holmes* v. *Williams*, 1 Root, 335, 343; Rev. 1821, p. 177 *n.*; *Fitch* v. *Brainerd*, 2 Day, 163, 189; *Baldwin* v. *Walker*, 21 Conn. 168, 180; *State* v. *Keena*, 64 id. 212, 214, 215. The underlying theory of the Connecticut law and of the English law, was the same: acts in violation of the public peace, and of the rules prescribing the duties of individuals to the State and to each other, as settled by universal acceptance, are offenses. Where these rules are not formulated by statute, they may be declared by courts; and a "common law" is developed in the process of so regulating the application of this theory through legislation and judicial decisions, as to produce a reasonable and defined system of jurisprudence. The main difference lay in the fact that Connecticut referred to "Jehovah, the great law-giver," to the "word of God," to the "justice and equity held forth in that Word," as authority for those universal rules which magistrates and legislators, "being intrusted by the freemen," have power, as "ministers of God for the good of the people, to declare, publish and establish," and made a fresh start on this basis; while the law of England, derived in theory from the same source, referred more directly to ancient statutes and customs, which had already moulded the underlying rules into a code in many respects repugnant to the conception of criminal law whose evolution became noticeable early in the 17th century. Our ancestors, in developing their criminal jurisprudence, adopted so much from the English common law, that the law in the two countries became for most practical purposes the same; but they did not adopt all the sanguinary features of the English code, nor the subtleties of technical distinctions that had grown out of conditions foreign to a new country.

When, therefore, our General Court in 1642 ordered that any man who shall "forcebly and without consent ravish any mayd or woman" shall be put to death, it prescribed the punishment for a definite crime at common law; as well by

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the word of God referred to in the act (Deut. 22, 25), as by the ancient statute Westm. 2, c. 34, referred to by the common law of England as then existing. The crime was the same in both aspects: the successful use of physical force by a man upon a woman for the accomplishment of unlawful copulation. According to West's Simboleography, first published in 1590, and for the following fifty years a most commonly used authority, "unlawful copulation is every carnal conjunction had out of lawful matrimony, and it is . . . . . either voluntary or violent; . . . . . violent, is termed a rape or ravishment." 2 West's Symb., Indictments, etc., § 54. All the elements of the crime,—the assault with physical force resulting in copulation against the will or consent of the victim,—are signified by the word rape, and the essential element of physical force alleged by the word "ravish." This appears from the precedents of indictment given by West, showing, in some merely the essential allegation, and in others details which were afterwards deemed material. "One O. etc. against her will feloniously did ravish, against the peace," etc. § 172. "Upon one A. etc. did make an assault and then and there the same A. against the will of said A. feloniously did ravish and carnally know, against the peace," etc. § 174. "With force and arms, viz., swords, staves, etc. upon F. etc. did make an assault and the body and belly of the aforesaid F. with his hands feloniously did wound, strike and lacerate, and the same F. against her will did then and there carnally know and feloniously ravish, against the peace," etc. § 328. Archbold, in more recent times, gives the violent assault and the resulting rape as the bones of a legal indictment. Archb. Cr. Pr. & Pl. (580). Indeed the indictment is in effect an allegation that "A. B. upon the body of C. D. did make a violent assault with intent to commit a rape, and her, the said C. D., did then and there ravish;" and so Archbold says in general (p. 459), that every attempt to commit a crime against the person of an individual without his consent, involves an assault under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the crime.

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This is especially true of rape, violence in the assault, *i. e.*, the use of physical force for the purpose of compelling submission, being one of the circumstances essential to make the successful attempt a rape. The Pennsylvania Supreme Court, in an early case, held that "ravish" includes an averment of force and against the will. *Harman* v. *Com.*, 12 Serg. & Rawle, 69. And our common law crime of attempt at rape requires an assault with physical force both adapted to and intended to result in rape. *State* v. *Danforth*, 3 Conn. 112, 115. The essence of the crime of rape does not lie in the act of copulation—that may be lawful or unlawful,—but in the use of physical force for the purpose of compelling submission. It is the great injury involved in this indignity that characterizes the offense. Perhaps the range of the crime has been extended by construction, but this is its real essence. In this respect rape differs from almost every other offense. The attempt to commit rape is not only necessarily involved in the committal of the offense, but the criminality of the completed act must be found in the nature of the attempt which is scarcely less atrocious. Formerly we punished the crime by death, and the attempt by imprisonment for life. Our common law, in defining the crime of rape, defined the crime of attempt to commit rape. The latter is involved in the former, and an indictment for the greater crime of necessity charges the lesser. So our common law has always permitted a conviction of the attempt, upon an indictment for rape. In this it differed from the common law of England, because the symmetry of that law was broken by the technical distinction between felony and misdemeanor, and the results flowing from that distinction. The "felony" of the English common law was foreign to our conditions and was not included in our common law (*State* v. *Setter*, 57 Conn. 461, 466); and the consequent rule which forbade a conviction of attempt upon an indictment for rape, because the former was a misdemeanor and the latter a felony, was never recognized by our law; on the contrary the accused may in such case be convicted of the attempt, because that is necessarily included in the greater crime and the facts constituting the attempt

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are alleged in the indictment for rape. *State* v. *Shepard*, 7 Conn. 54, 56; *State* v. *Parmelee*, 9 id. 259, 260; *State* v. *Dowd*, 19 id. 388, 391; *State* v. *Setter*, *supra*, 468. In *State* v. *Shepard*, the case of *Com.* v. *Cooper*, 15 Mass. 187, is cited as concurring in the view expressed, and it is now suggested that the latter case is modified by the decisions in *Com.* v. *Newell*, 7 Mass. 245, 249, and *Com.* v. *Roby*, 12 Pick. 496. In *Com.* v. *Cooper* the court seems to have held that the crime of attempt at rape is necessarily included in the crime of rape, and therefore one accused of rape can be convicted of the attempt, unless such conviction is prevented by the rule of the English law, in force in Massachusetts, that one accused of a felony cannot be convicted of a misdemeanor although the lesser offense is necessarily included in the greater; and also to have held that the Massachusetts statutes of 1784 and 1805 changed this rule and permitted the conviction of a misdemeanor on a charge of felony. It was upon the construction of these statutes that *Com.* v. *Cooper* was modified by the other decisions; and we have never supposed that they questioned the decision that an accused could be convicted of an attempt, upon a charge of rape, unless the English rule, which we have not adopted, were interposed. But if *Com.* v. *Cooper* must be considered as wholly overruled in Massachusetts, we think the principle of the case, aside from the question of statutory construction, is sound, and it is firmly established by our own decisions.

It follows from these considerations that § 1407 did not create a new statutory offense, but merely prescribed a new penalty for an existing common law offense; and in referring to that offense as an "assault with actual violence on the body of a female, with intent to commit rape," did not alter the character of the offense, but in this respect was in affirmation of the common law. Our statutes are full of instances where in fixing the punishment of a common law offense the crime is referred to, sometimes by its ordinary legal name, as rape, burglary, arson, etc., and sometimes by other descriptive words, more or less full. Such statutes as affecting the identity of the crime, are held to be in affirmation of the com-

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mon law. *State* v. *Gaul*, 50 Conn. 578, 580; *State* v. *Worden*, 46 id. 349, 362. This view is entirely consistent with *State* v. *Nichols*, 8 Conn. 496, and *State* v. *Wells*, 31 id. 210. In those cases the court was dealing only with the claim that the indictment did not follow the words of the statute, and held that to be unnecessary if the crime mentioned were sufficiently alleged. In the latter case the opinion fairly implies that the descriptive words in the statute (§ 1407) indicate an attempt to commit rape at common law, although the decision did not turn on that question. In 1790 "Newgate" was established as a State prison, and the Act prescribed what offenses should be punished by imprisonment in Newgate. In 1792 a supplementary "Act for punishment of certain offenses in Newgate," was passed; among these offenses was that of attempt at rape, described as "if any person shall with force and arms and actual violence an assault make upon the body of any female with an intent to commit a rape." This Act is the origin of § 1407. It prescribes imprisonment in Newgate as the punishment for an existing common law offense, and the language of the Act expresses, but does not alter, the descriptive elements of the existing offense. Before, as well as after the passage of the Act, an attempt at rape was an assault with force and arms and actual violence with intent to commit a rape. The provision in § 1407 authorizing the conviction of an attempt upon an indictment charging rape, was added in the Revision of 1875, and is plainly in affirmance of the common law.

Our conclusion is: that by the common law of this State attempt to commit rape is a crime necessarily included in the crime of rape and necessarily alleged in an indictment charging rape, and upon such indictment the accused may be convicted of the attempt; that in these respects § 1407 is in affirmance of the common law; that "attempt to commit rape," and "assault with intent to commit rape," are legal designations of the crime whose punishment is prescribed by § 1407, and in meaning the equivalent of "assault with actual violence upon the body of a female with intent to commit the crime of rape;" and that a partial verdict upon an informa-

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tion for rape, finding the accused "guilty of the crime of attempt at rape," complies with the essential requirements of clearness and certainty in designating the crime of which the accused is found guilty, under the information.

There is no error.

In this opinion the other judges concurred.

SARAH CUMMINGS *vs.* THE CITY OF HARTFORD.

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Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Notice to a policeman of a dangerous excavation in a sidewalk may be notice to the city, provided the ordinances and department rules make it the duty of such officer to inspect the condition of the streets, and in case of necessity to erect suitable barriers or safeguards for the protection of the public from injury; although the street department is the immediate representative of the city in respect to the maintenance and repair of its highways.

The memorandum of decision forms no part of the official record, unless made such by the finding.

If such memorandum announces conclusions of law controlling the decision, which the finding subsequently made does not present, resort may be had to it, under certain limitations, in aid of the appeal; but there is no occasion for this where no such variance appears.

The case of *Boucher* v. *New Haven*, 40 Conn. 456, explained and distinguished.

[Argued November 4th—decided November 30th, 1897.]

ACTION to recover damages for personal injuries caused by a defective highway, brought to the Superior Court in Hartford County and heard in damages to the court, *Elmer, J.*, after the defendant had suffered a default; facts found and judgment rendered for the plaintiff for $800 damages, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The finding stated the following facts:—The owner of a

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lot on Albany avenue in the city of Hartford, without any order or authority from the city, employed a contractor to replace a flag sidewalk in front of his lot by a granolithic one. The contractor began work early on August 13th, and stopped for the night at 6 P. M., leaving an excavation in the walk, from which the old flagging had been removed, 50 feet long, 5 feet wide, and 3 feet deep, adjoining the curbstone. An inner rim of the old sidewalk was left untouched, which was 3 or 4 feet wide. At each end of the excavation a plank, upon which a barrel was placed, was laid from this rim to the curb. The city charter and ordinances made it a misdemeanor to make any excavation in any street without a permit from the board of street commissioners, and a nuisance to make one without also protecting the public against danger "by means of fences, lights and any other precautions expedient or necessary for such protection." No such permit was obtained for this excavation. The city ordinances authorized any police officer of the city to keep all streets free from obstruction, and to require all persons whom they might see unlawfully obstructing them to desist therefrom; and particularly provided that policemen "shall especially attend to the keeping of the streets and sidewalks of the city clear of all unlawful obstructions, and shall report to the chief of police, through the captain, all unlawful obstructions thereof, who shall take immediate steps to remove the same." There was also a standing rule of the police department as follows: "Rule concerning the duties of a policeman. If he discovers any defect in the sidewalks or streets, large stone, or other obstruction upon the street liable to produce inconvenience or injury, he shall remedy or remove the same, or, if that is not possible, he shall take such measures as the case may require to prevent injury to the public, and immediately report the same to the chief of police."

Early in the morning of the day on which the excavation in question was begun, a police officer about to go on duty near said premises, noticed that the excavation was in progress, but made no inquiry as to whether a permit had been obtained for the work from the street board, as required by

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law. At about 7 o'clock in the evening of that day, when going off duty, he met the officer then going on duty on the same beat, and called the attention of the latter to the excavation in question, and its apparently dangerous character as to foot passengers, and suggested to him the propriety of providing suitable protection to guard them against injury, which might result from the same. Said officer then on duty, proceeded to the place in question and found the excavation as above described. He procured lanterns, which were lighted and placed, one upon the plank at the east end and one upon the plank at the west end of the excavation. No further steps were taken to guard the public from accident at this place. The officer proceeded to the discharge of his duty upon his beat, and thereafter paid no further attention to the said excavation until after the accident complained of.

About twenty-five feet easterly from the excavation, at the time of the accident, stood two shade trees whose foliage cast a shadow over and into the ditch at its eastern end, and to a considerable extent obstructed the light from an electric lamp situated about 225 feet east of the excavation. There was at that time no other source from which light was thrown upon the excavation, excepting a light from a store at the western extremity of the same, which was of no assistance or protection to persons approaching it from the east. The night was dark and the small light at the corner of the eastern end of the ditch offered little, if any, protection to the pedestrians approaching this place from the east.

Albany avenue at this place is a crowded street, being near Main street, and many pedestrians pass over it in the night season.

At about half past eight or nine o'clock in the evening of the day in question, the plaintiff, Sarah Cummings, having returned to Hartford after an absence of several days—and unaware of the excavation—in company with her sister, was proceeding along said street, approached the excavation at its eastern end, and walking by this point along the remaining portion of the flagwalk, advanced a short distance by the side of the ditch, when she fell in, followed by her companion.

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Neither at the side of the excavation where the plaintiff fell, nor at any point on the entire length of the side, was there any railing, board, or other barrier to protect pedestrians upon the said walk.

The provisions made by the police officer in question, by placing a lantern with dim lights at the ends only of the excavation, without any protection at the side, in a dark night in a crowded street where persons were constantly passing at that time in the evening, were inadequate properly to protect the public. The court found that this excavation, under the circumstances, constituted a dangerous defect in the said public street, and that the city of Hartford was guilty of negligence in not providing adequate protection for the public against injury from the same.

The plaintiff, at the time of the accident, was in the exercise of ordinary care and prudence, and was not guilty of contributory negligence.

It was the duty of the police officer who first discovered the excavation and the dangerous condition in which it would necessarily leave the walk, to have prevented the further unlawful obstruction of the highway; and thus a reasonable attention to the same by the city authorities would have, by proper precautions, prevented the accident. The measures finally taken by the police officer for the safety of the public were inadequate and insufficient. The defendant city had notice of the defect in the sidewalk, with sufficient opportunity to have avoided the accident by the use of reasonable means to protect the public.

Upon these facts the defendant made the following claims, all of which were overruled: (1) That adequate and reasonable protection was afforded the plaintiff and the public, by the measures taken as aforesaid, and the city was not, therefore, liable. (2) That actual notice should have been given to the street department, or its agents, of the existence of the excavation, or that it should have been in existence a sufficient length of time to have become notorious, and thus have attracted the attention of the city, in order to make the latter liable for neglect. (3) That as the excavation in question

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was made without a permit from the proper authorities of the city, and completed upon the day of the accident, whatever knowledge persons in authority had of the same, the street department had not been notified, and therefore the city did not have sufficient notice to charge it with liability except for nominal damages.

It was also assigned for error that the court ruled that it was the duty of the police officer who first discovered the excavation to have prevented the further obstruction of the highway, although it appears that the work which he saw going on was the laying of a new sidewalk, and there was nothing to lead him to suppose that it was being unlawfully done; that his failure to prevent it was conduct attributable to the city of Hartford, for whose results to the plaintiff the city must answer in substantial damages; and that, under the circumstances, it was the duty of the city to provide adequate protection against injury from the said excavation made in the process of constructing a sidewalk.

Edward D. Robbins and *William J. McConville*, for the appellant (defendant).

The case of *Boucher* v. *New Haven*, 40 Conn. 456, is not "similar" to the case at bar, as held by the trial court. In a case where the city has not ordered or contemplated the construction of a sidewalk, the duty of the city to remedy a defect produced by the work of construction does not arise until it has knowledge or means of knowledge that such work is in progress. *Manchester* v. *Hartford*, 30 Conn. 118; *Bill* v. *Norwich*, 39 id. 222; *Davis* v. *Guilford*, 55 id. 351, 357. The court below ruled, as appears from the memorandum of decision, that the policemen whose beat included Albany avenue, represented the city so far as the care of the streets was concerned, and that notice to them was, therefore, full notice to the city. If such is the law for the city of Hartford, it must be because of the existence of special legislation to that effect. The general rule is, as stated by Judge Dillon in his work on Municipal Corporation (4th ed. § 975), that "*police officers appointed by a city are not its agents or servants*, so as

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to render it responsible for their unlawful or negligent acts in the discharge of their duties." *Farrell* v. *Bridgeport*, 45 Conn. 195; *Perkins* v. *New Haven*, 53 id. 214; *Torbush* v. *Norwich*, 38 id. 225; *Hart* v. *Bridgeport*, 13 Blatch. (U. S.) 289; *Buttrick* v. *Lowell*, 1 Allen, 172; *Cobb* v. *Portland*, 55 Me. 381; *Caldwell* v. *Boone*, 51 Iowa, 687. Neither the charter nor the ordinances of the city purport to transfer to policemen the care of the streets and sidewalks. Moreover, any ordinances would be void which attempted to transfer to policemen the care of the streets and sidewalks of the city of Hartford. *Hartford* v. *Hartford Electric Light Co.*, 65 Conn. 324, 333. There is a rule of the police department, not established by law nor adopted by the court of common council, which directs the policemen to do what they reasonably can to prevent injury to the public by defects in the sidewalks or streets. This rule is a voluntary assumption by the police department of a service to the public not required by law nor ordered by the city. The police commissioners, who made this rule, and the policemen who are subject to it, "are state or public agents engaged in performing public and governmental duties," and "are not private agents or servants of the city."

William F. Henney, for the appellee (plaintiff).

Under the charter and ordinances of the city and the rules of the police department, it was the duty of police officers to prevent all unlawful excavations in the city streets, and if made without their knowledge or inability to prevent, to immediately take such steps as the case required to protect the public from inconvenience and injury which might arise from such excavation. In cases of this kind against municipal corporations, the question of notice is involved in determining the question of negligence, and the finding by the court below that the city had notice of the defect and a reasonable time to have remedied it, or protected the public against it, is not reviewable here. 2 Beach on Pub. Corp. § 1521. If, however, the question of implied notice is reviewable, the facts found fully justify imputed notice to the city. But the

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city had actual notice of the defect in question, as notice to a police officer was notice to the city. 2 Beach on Pub. Corp. § 1521; *Rehberg* v. *New York*, 91 N. Y. 137; *Twogood* v. *New York*, 102 id. 216; *Denver* v. *Deane*, 10 Colo. 375; *Bowan* v. *Tripp*, 14 R. I. 342; *Goulet* v. *Louney*, 159 Ill. 471; *Hawley* v. *Gloversville*, 33 N. Y. Supp. 647. But no notice of any kind, in the case at bar, need be proven in order to charge the city with liability. *Boucher* v. *New Haven*, 40 Conn. 456.

BALDWIN, J. Every municipal corporation which is charged with the duty of maintaining the highways within its limits in sufficient condition of repair, is bound to make use of such agencies as the law may provide, or reasonable care demand, for ascertaining from time to time what their condition is, and remedying any defects that may be found to exist. By the charter of the city of Hartford, the board of street commissioners, whose duty it is to appoint a superintendent of streets, is made such an agency (VI. Special Laws, p. 743); but it is not necessarily the only one to be employed. The common council could not withdraw the general supervision of the streets from that board, but they could aid or supplement the exercise of its powers, by appropriate ordinances. *Hartford* v. *Hartford Electric Light Co.*, 65 Conn. 324, 329. The charter also provides for a city police department, and leaves it to the proper municipal authorities to prescribe in detail the duties of the policemen, (V. Special Laws, p. 322). Their primary duty is to guard the city by day and night and preserve the public peace. In this they are the agents of the law, and in a certain sense officers of the State. *Farrell* v. *Bridgeport*, 45 Conn. 191, 195; *State* v. *Pinkerman*, 63 id. 176, 182. But as the performance of this duty necessarily involves patrolling the streets, it is obvious that the patrolmen are in a position which gives them special opportunities for inspecting the condition of these streets, and observing any defects in them as soon as they arise. As they are appointed and paid by the city, and there is no incompatibility between the function of guarding the public

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against acts of criminality, and that of guarding it from harm by acts of trespass or negligence, it was proper for the defendant to lay down the duties of policemen, as was done in the ordinance (Chap. XIII.) and rule, set forth in the finding. By thus commissioning an existing agency to inspect the street and in case of need to remedy defects, the city was relieved of a needless expense which would have been incident to the organization of a patrol force of equal efficiency, to act under the orders of the board of street commissioners.

While, therefore, that board is the immediate representative of the city in respect to whatever pertains to the repair of streets, and notice to it of any want of repair is, as matter of law, notice to the city, it is also true that every patrolman on the police force has been placed in such a position that notice to him of any such want of repair may, under certain circumstances, be notice to the city. Such circumstances the Superior Court held to exist, in the case at bar, and there is nothing in the facts found to impugn the validity of the conclusion.

The ruling that the policeman on day duty who first discovered the excavation should have "prevented the further unlawful obstruction of the highway," was incorrect. It assumes that he knew or ought to have suspected that the work was being done without a permit. On the contrary, he had a right to presume that before undertaking to relay a sidewalk upon a crowded street, the contractor had obtained the necessary authority from the board of street commissioners. He was, therefore, in no fault for not inquiring as to this point, or for not immediately reporting what he had seen to the chief of police.

The policeman on night duty, however, was placed in a different position. His attention was called about sundown to the dangerous condition in which the sidewalk had been left, and the obvious insufficiency of the barriers placed for the protection of pedestrians. He procured a couple of lanterns and set one on the plank at each end of the ditch, but left it otherwise wholly unguarded on either side for its entire length of fifty feet; proceeding upon his beat, without tak-

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ing any further precautions, or making any report to his superiors. In this he failed to comply with the rules of the department, which provided one of the principal means relied on by the city for the discharge of its duty of keeping the streets in repair. The Superior Court was warranted in finding that under all the attending circumstances the city had sufficient notice of the defect to enable it to provide proper safeguards to protect those passing upon the street, and that it was negligent in not making such provision. It is true that in arriving at these results some weight was attached to what was held to be the default of the first policeman; but the conclusion as to actionable negligence was amply justified by the conduct of the second, and the judgment is fully supported by the finding that the measures which he took for the safety of the public were inadequate and insufficient.

In the memorandum of decision, filed at the date of the judgment, and several weeks before the finding, the following language is used: "The rule that notice of a defect in the highway to any municipal officer having a duty to perform in this direction is notice to the municipality, seems to cover this case. Aside, however, from the legal question of notice, the city cannot plead the same in the negligent omission of its own duty."

The defendant claims that from this it appears that the court was governed in rendering the judgment by the assumption that want of notice to the city of the defect in the street was of no importance. This does not appear in the record, of which the memorandum of decision forms no part, unless made such by the finding.

Such an assumption, however, was apparently made, and was probably founded on a misconception of the ruling of this court in *Boucher* v. *New Haven*, 40 Conn. 456. In that case, a city was sued by a pedestrian who fell into a hole carelessly left unguarded in relaying a sidewalk in front of his lot, and notice of the existence of the defect to the municipal authorities was held unnecessary. There, however, the city had ordered the new sidewalk laid, and was therefore put upon inquiry as to the commencement of the work.

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Here, on the other hand, the landowner proceeded upon his own motion, and there was nothing to lead the city to suppose that any such improvement was in contemplation. It would therefore have been fatal to the plaintiff's case had she failed to prove either notice in fact, or such an omission by the city to exercise that reasonable supervision over its streets which was incident to its duty to maintain them in repair, as would be of itself negligence naturally leading to her injury.

But the memorandum of decision states, in effect, that there was notice in fact by reason of notice to a proper municipal officer; and in this respect is in accord with the finding.

It is on the sufficiency of the finding to support the judgment that the case turns. If a memorandum of decision announces conclusions of law controlling the decision, which a finding subsequently made does not present, resort may be had to it under certain limitations in aid of an appeal. *Styles* v. *Tyler*, 64 Conn. 432, 439, 463. But there is no occasion for this where no such variance appears. None is shown in the present case. The memorandum of decision, as to the point now in question, simply amounts to a statement by the trial judge that if a condition of things existed which in his opinion did not exist, a certain conclusion of law would follow. This statement was incorrect, but it related to a question not raised by the facts actually found. These cover the case and are decisive of the issue.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

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FREDERICK J. GUSTAFSON ET UX. *vs.* CHARLES P. RUSTEMEYER.

First Judicial District, Hartford, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A mere naked, false representation as to the value of real estate, made by the vendor to his vendee, is not actionable unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was induced to forbear inquiry must be specifically pleaded.

An appellant's claims of error must be confined to those made in the court below and assigned in his reasons of appeal.

In an action to recover damages for fraud in the sale or exchange of property, real or personal, the measure of damages is the difference between the actual value of the property at the time of the sale or exchange, and what it would have been worth if it had been as represented.

False and fraudulent oral representations by a vendor of land, as to its boundaries and dimensions, are admissible to show the fraud which induced the buyer to accept a deed of the property, notwithstanding the asserted acreage is therein described as "more or less."

Parties are entitled to know which of two conflicting rules for measuring damages was adopted and applied by the trial court. But if the application of either rule would have led to substantially the same result, the error must be considered as harmless and not ground for a new trial.

[Argued October 5th, 1897—decided January 5th, 1898.]

ACTION to recover damages for fraud in the exchange of real estate, brought to the Superior Court in Hartford County and tried to the court, *Elmer, J.;* facts found and judgment rendered for the plaintiff Johanna Gustafson, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The complaint alleged in substance that the defendant, who owned a farm in Suffield which he knew in fact to contain only seventy-eight acres of land, in order to induce one of the plaintiffs, the wife of the other plaintiff, to purchase said farm and a certain quantity of lumber, falsely and fraudulently represented to the plaintiffs that the farm contained 186 acres of land, and that he owned 10,000 feet of lumber, when he in

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fact knew that said farm contained only 78 acres, and he only owned 1,000 feet of lumber; and that the wife relying upon the said representations was thereby deceived and induced to purchase said farm and lumber, and to give to the defendant in exchange therefor $500 and certain real estate on Julius street in Hartford, of the value of $1,750 above all incumbrances.

The answer was in effect a general denial, and with it was filed the following counterclaim: "1. In the transaction referred to in the complaint, plaintiffs represented to the defendant that the property on Julius street was worth $3,000 over and above incumbrances, and thereby induced the defendant to make, execute, and deliver to the plaintiffs a deed of the land in question. 2. The property on Julius street was of little if any value over and above the incumbrances, as the plaintiffs well knew at the time of the transaction, but defendant says that they made the representations fraudulently and falsely, and for the purpose of inducing the defendant to convey the said Suffield property, to his great loss and damage. 3. Relying upon the plaintiff's representations, the defendant made, executed and delivered [a deed of] his Suffield property referred to in the complaint, to his great loss and damage. Defendant claims by way of counterclaim $3,000 damages, and asks to recover the whole of said sum, or any part of the same over and above the amount, if any, that shall be allowed to the plaintiff in this action."

The following demurrer was filed to the counterclaim: "Plaintiffs demur to so much of the defendant's answer as is contained in the counterclaim, and for reasons of demurrer they assign the following, to wit: 1. The alleged false representations, as appears from the answer, are matters of information, judgment and estimation only, and are therefore not actionable. 2. It is not stated in the counterclaim that plaintiffs made any false representations of fact upon which the defendant had a right to rely. 3. It is not averred in said counterclaim that the plaintiffs made any false representations as to any facts, but only that they falsely stated the value of said real estate. 4. It does not appear from the counter-

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claim that at the time said defendant received and accepted the deed of said real estate on Julius street, he was not fully informed as to the true value of said real estate, nor does it appear but that he was equally qualified with the plaintiffs to judge as to its true value." The court (*Hall J.*) sustained the demurrer.

The substance of the finding is as follows: On the 28th of September, 1894, the defendant being the owner of a certain farm in Suffield, Connecticut, conveyed it to the plaintiff, Johanna Gustafson, by warranty deed. As comprising said farm said deed described three separate parcels of land, one containing 6 acres, more or less, one containing 120 acres, more or less, and one containing 60 acres more or less, a total of 186 acres, more or less. The boundaries given in said deed were correct, but the first piece of land described in said deed as 6 acres more or less, contained only 5¼ acres; the second piece, described as containing 120 acres more or less, contained only 51¾ acres; and the third piece, described as containing 60 acres more or less, contained only 39½ acres, a total of 96½ acres. Prior to this conveyance the plaintiff, in company with the defendant, visited said farm, and, under the direction of the latter, passed across the three pieces. They did not go around them, the second and third pieces being irregular in shape and somewhat obstructed with undergrowth, bushes and trees. At this time, while upon this land, the defendant indicated to the plaintiffs different objects as being upon the boundary line of said tract, which proved to be beyond the boundary line; and at this time the defendant represented to the plaintiffs that said second piece of land contained 120 acres, and said third piece contained 60 acres. At the time of these representations, and at the time of said conveyance, the defendant knew that there were not 186 acres of land in said tract. He had, sometime prior to the representations aforesaid, caused said land to be measured by a surveyor, and had seen the report of the surveyor showing that there were less than 100 acres of land in said tract, and at this time was aware of the correct or approximate number of acres contained in the same.

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Shortly before the conveyance of said land the defendant represented to the plaintiffs that he had purchased 10,000 feet of lumber with which to erect a tobacco shed on said land. At this time there was 1,000 feet of lumber on the land, and the defendant represented that the remaining 9,000 feet would be soon delivered, and that the possession and ownership of all of said lumber would be transferred to the plaintiff Johanna, when the conveyance of the land was made to her. In exchange for said tract of land conveyed by the defendant to the plaintiff Johanna, the latter paid the defendant $500 in money, and the plaintiffs also executed and delivered to the defendant a deed of certain real estate, consisting of a house and lot situated on Julius street in the city of Hartford, belonging to the plaintiff Johanna Gustafson, the value of which was estimated to be $1,750 above a mortgage incumbrance. At the time the representations were made as to the purchase of lumber, the defendant had not purchased and paid for the same as he represented, nor has the same ever been purchased and delivered to the plaintiffs. And when the defendant made the aforesaid representations to the plaintiffs with reference to the quantity of land in said tract and as to his purchase of lumber which was to be delivered to the plaintiff Johanna, he knew that such representations were false, and he knowingly and willfully made said false representations with intent thereby to deceive the plaintiffs, and to induce them to convey the property on Julius street, to the defendant, and to pay to him the said sum of $500; and relying upon the truth of said representations they were deceived and defrauded by the defendant. The land conveyed by the defendant to the plaintiff Johanna, was of the value of ten dollars per acre. In form the deed was adequate, and did convey title to the premises in question.

Upon the trial below the defendant, for the purpose of showing the value of his farm when it was conveyed, as compared with the value of the Julius street property which he received in exchange, asked a witness the following question: "How did the farm compare in value with the house, . . . which was worth the most?" This was objected to by the

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plaintiff, the court held it to be immaterial, and said "that is excluded for the present." To this the defendant excepted, and asked the court to allow the stenographer to note an exception. The court replied, "I will eventually." Nothing more appears to have been done about the matter.

One of the plaintiffs, the wife, was called as a witness to testify to a conversation she had with the defendant, about a month before the deed of the farm was delivered to her, concerning the size of each of the three pieces of land. As she was about to testify the following occurred:—"Q. What, if anything, did Mr. Rustemeyer say,—did you hear him say anything about the number of acres of land there was in that farm? Mr. Henney: I object. Mr. Barbour: On what ground? Mr. Henney: On the ground that this conversation had taken place in August; late in August is too remote. They made no bargain at that time. The deed is dated the 28th of September; they made no bargain at that time, no deeds were drawn. The deed was drawn here in Hartford, or drawn in Suffield, and executed here in Hartford, and so it was over a month between the conversation and the final transaction. Inasmuch as they made no bargain then, they cannot base any false representations upon a statement made at that time. The court: Was this part of the inducement as you claim? Mr. Barbour: Yes sir, on which the final bargain was made. The court: You may ask it. Mr. Henney: Will your Honor note an exception? The court: I take it this led to the bargain. Mr. Barbour: Yes sir. The court: Go on with the examination." The witness then testified in substance that the defendant at that time said that the home lot contained 6 acres, the second piece 120 acres, and the third piece 60 acres.

Upon the trial the plaintiffs claimed that the rule of damages, in case of judgment for the plaintiffs, should be the difference between the value of the property which the defendant represented that he owned and conveyed, and its value if it had been as represented. The defendant claimed that the measure of damages was the difference between the value of the tract of land in Suffield and the value of the

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property given by the plaintiff in exchange for it. With reference to these claims the court said: "Adopting either rule, I find from the evidence as to the value of the several properties, that the result would be approximately the same, and that the sum of $925 is the amount of damages which the plaintiff, Johanna Gustafson, is entitled to recover under the allegations of the complaint and the facts proven at the trial."

In the reasons of appeal the defendant claims that the court below erred: (1) in sustaining the demurrer to the counterclaim; (2) in sustaining the objections to the interrogatories of defendant's counsel as set forth in the finding; (3) in holding that all the representations and agreements of the defendant as to the dimensions of the tract of land set forth in the warranty deed, were not embraced in the deed itself and in the descriptions contained therein; (4) in not assessing damages upon some established rule; in refusing to adopt some rule as to the measure of damages, and in approximating damages to the injury complained of, instead of awarding them in accordance with the rules of exact justice.

William F. Henney, for the appellant (defendant).

The representations as to dimensions were not facts peculiarly within the knowledge of the defendant, nor such as the plaintiffs were bound to rely on, but were all made upon the premises, which were open to the observation and examination of the plaintiff, and could easily have been correctly ascertained by measurement before the deeds passed, September 28th, 1894, as they were all made fully a month prior to that date. *Walmsley* v. *Currence*, 25 W. Va. 543; *Crown* v. *Carrager*, 66 Ala. 590; *Chrysler* v. *Canaday*, 90 N. Y. 277; *Simar* v. *Canaday*, 53 id. 306. The court erred in sustaining the demurrer to the counterclaim, thus preventing the defendant from offering evidence to show that the representations as to the value of the Julius street property were falsely made with the intent to induce the defendant to part with his property to his damage. *Simar* v. *Canaday*, *supra*. The court erred in excluding the testimony offered to show the comparative value of the Suffield farm and the Julius street

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property. It is settled in cases of this kind in the Federal Courts, that the true rule of damages is not the difference in value between what plaintiff got and what he bargained for, but the difference between the value of what he gave and what he received in the trade. *Smith* v. *Bolles*, 132 U. S. 129; *Atwater* v. *Whiteman*, 41 Fed. Rep. 428; *Glaspell* v. *Northern Pacific R. Co.* 43 id. 900. Defendant was entitled to have the court adopt a definite rule of damages. This would seem to be self-evident. The court erred in refusing to hold, under all the circumstances of this case, that all the representations as to the dimensions of the property were embraced and must be found in the descriptive part of the deed itself.

Joseph L. Barbour, for the appellee (plaintiff).

The court did not err in sustaining the demurrer to the counterclaim. Misrepresentations must be of a fact, not expressions of opinion. Statements as to value are usually expressions of opinion, not to be relied on. *Homer* v. *Perkins*, 124 Mass. 431; *Gordon* v. *Butler*, 105 U. S. 553; *Ellis* v. *Andrews*, 56 N. Y. 83–85; *Schranum* v. *O'Connor*, 98 Ill. 539; *Anderson* v. *M'Pike*, 86 Mo. 293; *Dawson* v. *Graham*, 48 Iowa, 378; *Slade* v. *Greviston*, 93 Ind. 591; *Chrysler* v. *Canaday*, 90 N. Y. 272–279. If the evidence had been definitely and finally excluded, and exception duly taken, it would not have been admissible for the purpose for which it was offered, to wit: to fix the measure of damages. That rule is settled in this State by the case of *Murray* v. *Jennings*, 42 Conn. 9. See also *Brush* v. *Keeler*, 34 id. 500; *Scranton* v. *Mechanics Trading Co.*, 37 id. 130; *Krumm* v. *Beach*, 96 N. Y. 398; *Stiles* v. *White*, 11 Met. 356; *Morse* v. *Hutchins*, 102 Mass. 439. A deed is not such a written instrument as will compel the exclusion of parol testimony as to its consideration, or antecedent representations concerning it. *Belden* v. *Seymour*, 8 Conn. 304; *Meeker* v. *Meeker*, 16 id. 387; *Baldwin* v. *Carter*, 17 id. 205; *Clark* v. *Tappin*, 32 id. 69. Parol evidence is admissible to contradict, vary, or avoid a written instrument, where it clearly shows that but

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for the oral stipulations it would not have been executed. *Warner* v. *Landis*, 137 Pa. St. 61; *Pierce* v. *Woodward*, 6 Pick. 206; *Willis* v. *Hulbert*, 117 Mass. 151. Rules of evidence which exclude parol proof, when offered to affect written instruments, will generally give way and allow the fraud to be proved. *Collins* v. *Tillou*, 26 Conn. 368; *Dale* v. *Gear*, 38 id. 15; *Felts* v. *Walker*, 49 id. 98; *Busick* v. *Van Ness*, 44 N. J. Eq. 82; *Deakins* v. *Alley*, 9 Lea, 494. Parol evidence is admissible to prove fraudulent representations inducing a written contract for the sale or exchange of land. *Wilson* v. *Haecker*, 85 Ill. 349. It is admissible to prove fraudulent representations by a lessor which induced the lessee to execute a lease. *Morris* v. *Shakespeare*, 11 Central Rep. (Pa.) 196. The failure of the trial court to adopt a specific rule of damage, if erroneous, worked no injury to the defendant; inasmuch as it appears that the result would have been substantially the same, whichever rule had been adopted. *Wooster* v. *Glover*, 37 Conn. 316; *Brush* v. *Keeler*, 34 id. 499; *Kelsey* v. *Hanmer*, 18 id. 320.

TORRANCE, J. The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon, relates simply to the worth of the Julius street property over and above the incumbrances. It is a mere naked representation of the value of an equity of redemption, and nothing more. The general rule is that a mere naked assertion of value, without more, made between vendor and vendee during negotiations for a sale, though untrue and known to be so by the one who makes it, and relied upon by the other to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion and not of a fact, and the party to whom it is made has no right to rely upon it; and if he does so his loss, if any occurs, is held to be the result of his own folly. Bigelow on Fraud, 490; *Parker* v. *Moulton*, 114 Mass. 99; *Morse* v. *Shaw*, 124 id. 59; *Homer* v. *Perkins*, ibid. 431; *Ellis* v. *Andrews*, 56

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N. Y. 83; *Chrysler* v. *Canaday*, 90 id. 272; *Shanks* v. *Whitney*, 66 Vt. 405, 29 Atl. Rep. 367. See also cases cited in note to *Cottrill* v. *Krum*, 100 Mo. 397, in 18 Amer. St. Rep. 556.

There are undoubtedly exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made; as for instance where the one who makes the representation holds a position of trust or confidence towards the other, which gives the latter a right to rely on the representation; or where the seller has or assumes to have special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's representation; in such cases the seller may justly be held liable for his false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth.

A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim *caveat emptor* applies. The buyer is not excused from an examination, unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only." *Parker* v. *Moulton*, 114 Mass. 99, 100; *Ellis* v. *Andrews* and *Chrysler* v. *Canaday*, *supra*.

Upon the counterclaim as it stands, the defendant's case falls within the general rule and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained.

In his brief the defendant claims, in substance, that the

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general principles here applied to the statement of facts in the counterclaim, if applied to the facts found, show that the plaintiffs have no cause of action. He says: "Misrepresentations of the dimensions of the farm in question by the defendant to the plaintiff, even though intentional, cannot lay a foundation for an action upon the facts found by the court."

If the defendant were at liberty to make this claim here, it might be shown in reply that the facts set up in the counterclaim, and the facts found, differ very materially, and that this difference may be just the difference between a false representation that is actionable and one that is not. But the defendant, under the statute (General Statutes, § 1135), is not at liberty to make this claim here, because he did not make any claim of this kind in the court below, nor has he made it in his assignments of error. Under the circumstances of this case we decline to consider this claim.

The defendant claims that the court excluded the evidence of the value of the Julius street property, as compared with the value of the farm, and that it erred in so doing. Although there is some doubt as to whether the court did absolutely and finally rule this evidence out, we will consider the case as if it had so ruled.

The defendant claimed that the measure of damages was the difference between the value of the farm and the value of the property given in exchange for it; while the plaintiffs claimed that it was the difference between the value of the property which the defendant owned and conveyed, and its value if it had been as represented. From the record it is clear that this evidence was offered solely as bearing upon the question of damages, and on the assumption that the rule as to the measure of damages was as claimed by the defendant. In his brief the defendant now claims that the evidence was admissible for another purpose, namely as "tending to show the improbability of his having made the representations complained of." The evidence was undoubtedly admissible for this purpose, and for other purposes; for instance as evidence, but not conclusive, to show from the price paid the value of the farm conveyed to the plaintiffs. Bigelow

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on Fraud, 627, 628; 3 Sutherland on Damages, 592. But the trouble with this claim is that it was not made in the court below, and cannot be considered now. The question, then, whether the court erred in excluding this evidence, depends on the further question, what is the proper measure of damages in cases of this kind? A vendee induced to purchase land by false and fraudulent representations, may, acting seasonably, rescind the contract, and after giving or offering to give back what he received, recover back the consideration; or he may retain the land and recover damages, in a proper action, for the deceit. *Ives* v. *Carter*, 24 Conn. 392, 403; *Krumm* v. *Beach*, 96 N. Y. 398; *Vail* v. *Reynolds*, 118 id. 297; *Pryor* v. *Foster*, 130 id. 171.

The present case is one where the plaintiffs have elected to keep the land and seek to recover for the deceit in an action of tort, and the question is, what is the measure of damages in this action? Upon this question the decisions of the courts of last resort are not in harmony. In one class of cases the measure of damages is held to be the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be; while in the other class of cases it is held to be the difference between the real value of the property retained by the plaintiff, as it was at the time of the purchase, and the value of that which he gave for it. In the former class of cases the plaintiff is allowed the benefit of his bargain, in the latter he is not. *Morse* v. *Hutchins*, 102 Mass. 439, is an example of the first class of cases, while *Smith* v. *Bolles*, 132 U. S. 125, is an example of the other class.

In *Morse* v. *Hutchins*, p. 440, the court say: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be. . . . This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the

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plaintiff . . . only the difference between the real value of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."

In *Smith* v. *Bolles*, p. 129, on the other hand, it was said: "The measure of damages was not the difference between the contract price and the reasonable market value, if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations. . . . The defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation."

Both of these cases relate to sales of personal property, but no distinction is made, in the application of these rules, between sales of personal and sales of real property; Bigelow on Fraud, 627; Sedg. on Damages (2d ed.) [559]; 3 Sutherland on Damages, §1171; and no good reason has yet been given why there should be any such distinction. Both courts, in the cases above mentioned, recognize the existence of the general rule that the defendant is only liable for such damages as are the natural and proximate result of his fraud, but they differ in applying it. In *Morse* v. *Hutchins*,

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the loss of the benefits of his bargain is regarded as one of the elements of plaintiff's damage resulting naturally and proximately from the fraud, while in *Smith* v. *Bolles* such loss is not so regarded.

The general rule in regard to the measure of damages in actions of deception has been stated, and we think correctly, as follows: "The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence." Bigelow on Fraud, 625. Applying the general rule as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable. In Bigelow on Fraud, 627, the rule is stated as follows: "It is now well settled that in actions for deceit or breach of warranty in sales, of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be;" citing numerous cases. This is the rule also as stated and favored in 3 Sutherland on Damages, pp. 589, 592. It is the rule adopted and followed in numerous cases relating to the sale of personal property, and it is the rule adopted and followed in the following cases relating to the sale of real estate: *Krumm* v. *Beach* and *Vail* v. *Reynolds*, *supra*, in New York; *Drew* v. *Beall*, 62 Ill. 164, 168; *Nysewander* v. *Lowman*, 124 Ind. 584; *Page* v. *Parker*, 43 N. H. 363; *Shanks* v. *Whitney*, 66 Vt. 405; *Williams* v. *McFadden*, 23 Fla. 143. Moreover it is the rule adopted and followed by this court in *Murray* v. *Jennings*, 42 Conn. 9. In that case it does not appear to have been much discussed, but its application was directly in question, was indeed the only question in the case, and it was specifically and deliberately adopted and followed. We see no good reason why it should not be considered as the settled rule in this State.

The evidence of the value of the Julius street property,

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then, having been offered solely for the purpose of showing the amount of the plaintiffs' damages under the rule laid down in *Smith* v. *Bolles*, *supra*, was inadmissible, and the court committed no error in excluding it for that purpose.

The defendant further claims that the court erred in holding that all his representations as to the number of acres in the farm "were not embraced in the deed itself and the descriptions contained therein." From the objectionable way in which this matter is stated in the record, by transcript from the stenographer's notes instead of a brief statement of the point by the court in the ordinary manner, it is a little doubtful just what the precise claim of the defendant was before the lower court upon this point. He seems to claim that as the false representations were made about a month before the deed was made, they were too remote in time to be admissible; but in his brief he says the court "erred in refusing to hold that all the representations as to the dimensions of the property were embraced and must be found in the descriptive part of the deed itself." He says, in effect, that the representations were made a month before the deed was given, that plaintiffs had ample opportunity during that month to find out whether they were true or false, and that they then accepted a deed repugnant on its face to the representations; and that these facts show that it is "hardly credible that after all these representations the defendant executed, and the plaintiffs accepted, a deed radically different from their tenor."

These facts were entitled to great weight as evidence bearing upon the question whether the plaintiffs relied on such representations, and whether they were made at all, and we must upon this record assume that the court gave to them all the weight to which they were entitled; but in spite of them the court found against the defendant on this point as upon a matter of fact, and we cannot review that finding here.

We understand the real claim of the defendant, upon the point now in question, to be that evidence of the oral representations was inadmissible because it tended to contradict,

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or vary, or add to the deed in some way; that all such representations prior to the deed were merged and embraced in it, and so could not be proved.

This claim is not tenable. The evidence was not offered to contradict, add to, or vary, the deed, but to show the fraud as alleged, which could be shown in no other way. It was offered to show the false representations which induced the plaintiffs to enter into this transaction and to accept the deed. Certain monuments were pointed out by the defendant to the plaintiffs as marking the bounds of the land as to which they were in treaty, which in fact were situated outside of it. This was done with an intent to deceive, and led her to accept the deed subsequently tendered, without having the property surveyed or making any further examination as to the number of acres embraced within the boundaries mentioned in the conveyance. Her omission to take such steps was a natural consequence of the fraudulent representations. They had precisely the effect designed by the defendant, and he was properly held responsible for the resulting damage. As was said in *Russell* v. *Tuttle*, 2 Root, 22: "This action is not laid upon the writing, but for the fraud . . . which can be no otherwise proved than by the testimony of witnesses." In *Cabot* v. *Christie*, 42 Vt. 121, a vendor orally and falsely represented that a farm contained one hundred and thirty acres, when it contained but one hundred and seventeen, and it was held that although a parol warranty could not be shown as against the deed, fraud in representing the quantity could be shown. In *Whitney* v. *Allaire*, 1 Coms. 305, 308, it is said: "For more than thirty years it has been the settled doctrine of the courts of this State, that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good cause of action, and that it is immaterial whether any or what covenants are contained in the deed of conveyance."

In *Carvill* v. *Jacks*, 43 Ark. 439, a vendee induced to accept a deed by false and fraudulent representations, sued for damages for the fraud, and it was held that notwithstanding the deed and its covenants, he could prove the

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oral representations. A similar ruling was followed in *Dano* v. *Sessions*, 65 Vt. 79, *Keefe* v. *Sholl*, 181 Pa. St. 90, and *Griswold* v. *Gebbie*, 126 id. 353, cases where vendee, after a deed to him, sued for fraud in the sale of real estate. See also the following cases where fraud was allowed to be shown notwithstanding the fact that the evidence in one sense tended to contradict a writing: *Cummings* v. *Cass*, 52 N. J. L. 77; *Mallory* v. *Leach*, 35 Vt. 156; *Cole* v. *High*, 173 Pa. St. 590; *Feltz* v. *Walker*, 49 Conn. 93–98; *Fox* v. *Tabel*, 66 id. 397–400. The court below did not err in admitting the evidence in question.

In his last assignment of error the defendant claims, in effect, that the court failed to adopt and apply any fixed rule as to the measure of damages, and did not assess them "in accordance with the rules of exact justice." The record shows that the parties upon the trial made specific conflicting claims with respect to the rule of damages, and they were entitled to have the true rule applied, and to know which of the conflicting rules was applied by the court. It was the duty of the court to adopt and apply the rule which the plaintiffs contended for, and it was also its duty to make this known to the parties in some way. The record upon this point is not as clear as it should be. It says: "Adopting either rule, I find from the evidence as to the value of the several properties, that the result would be approximately the same." The fact implied in this statement, that the court had heard and considered evidence as to the value of both properties, would seem to indicate the adoption of the rule which the defendant contended for, while there are other things elsewhere in the record which seem to indicate that the court adopted the other rule. The record does not show, either expressly or by clear implication, which of the conflicting rules the court adopted and applied. Perhaps the fair import of the record is, that in the process of assessing the damages the court applied both rules and, finding the results approximately the same, did not decide which of them was the true rule and exclusively applicable. It was the duty of the court to decide this question, however,

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and to make its decision manifest in some way to the parties, and this was not done. We think the court erred in this, but if, as is found, the application of either rule leads, in this case, to substantially the same result, it is difficult to see how the defendant has been harmed by the error, and for this reason we do not advise a new trial on account of it.

There is no error.

In this opinion the other judges concurred, except HAMERSLEY, J., who dissented.

HAMERSLEY, J. (dissenting). In an action of fraud the plaintiff can recover the amount of his actual damage. The elements of actual damage depend on the circumstances of each case, are widely variant, and can hardly be defined accurately in a general rule. Where a vendor warrants an article sold to be of a certain kind, he makes a special contract to indemnify the vendee for any loss by reason of the article not being of that kind; and so, in case of a breach of the warranty, he is bound by force of the contract to put the vendee in the same position he would have occupied if the article had been as warranted. In other words, the damage to the vendee is the loss of the benefit of his contract. In a large class of sales of personal property a contract of warranty may be established by proof of false representations. In such cases it has been held that so far as the damage was concerned, it was immaterial whether the form of action was the one provided in case of fraud or in case of breach of warranty; that in either case a contract was established by the same proof, and in either case the plaintiff was entitled to the benefit of his contract; but entitled to that benefit solely because the contract had in fact been validly proved. And so for this class of cases a special rule was recognized, that in actions of fraud where a sale had been induced by false representations, the plaintiff could recover the benefit of his contract. But it is evident that such rule implies an existing contract of indemnity, and cannot apply where such a

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contract is not proved. It might have been better if in such cases the courts had held the plaintiff to his action of contract, when he merely sought to recover for its loss; but it is certain the rule cannot be extended beyond its reason, without leading to unfortunate confusion in respect to the features which distinguish contract from tort. I do not understand the majority of the court to question this, but to hold that the present case is within the reason of this special rule. It seems to me, however, that it is not. False representations as to certain classes of personal property may establish a contract of warranty; this is not true as to representations of the dimensions of land sold. A contract of warranty in such case can only be proved by the writing. The present plaintiff could not have recovered the alleged benefit of his contract in an action for a breach of contract. There was no legal contract of indemnity and he could, therefore, prove no breach and no damage. There was a fraud which induced an exchange of land, and he can recover for the damage resulting from that exchange; but not, as it seems to me, for the loss of the benefit of a contract which he has not made.

I think, also, that the error in refusing to assess damages in accordance with a rule adopted by the court, is fatal. If we assume that the judge made a separate assessment under each rule and reached substantially the same result, yet he did not reach the same result, whatever latitude we may give to the word "substantially." The assessment adopted must have followed one or the other rule (for the judgment is clearly illegal if he followed neither); and if his judgment following the wrong rule is a single dollar larger than it would have been following the right rule, it involves the violation of a legal right. To sustain the judgment on the ground that no practical injury was done, the assessment under each rule must have been validly made; but the assessment under the rule claimed by the defendant, was made, if not without evidence, yet in the absence of material evidence which the defendant was not permitted to introduce. I think there is error and that a new trial should be granted.

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SAMUEL SWAN ET AL. *vs.* THE CITY OF BRIDGEPORT.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action against an officer for a negligent escape and for a failure to return the process to court, the plaintiff is entitled to recover the actual damage he has sustained by reason of the officer's default.

Ordinarily the amount of this damage is *prima facie* established by proof of the judgment in the former action and of the plaintiff's inability to collect it by legal process. But where the officer's failure to return the writ and complaint makes such evidence impossible, the plaintiff may prove what judgment he might or could have obtained in the former action, had the process therein been returned to court.

A complaint alleged that the defendant obtained a loan from the plaintiff by means of a forged and counterfeited promissory note. The evidence showed that the plaintiff was induced, by means of the forged note, to surrender to the defendant a valid claim against him, evidenced by a note upon which he was indorser. *Held* that the gist of the action was the fraud of the defendant, and that the allegation of a loan was merely matter of inducement. *Held* also, that if such allegation could be regarded as a material one, the facts proved showed no fatal variance, inasmuch as it appeared that the parties had treated the notes as money or as a loan.

The trial court found that the plaintiff's damage was the amount due him upon the forged note, and rendered judgment for that sum. It did not appear that a judgment against the defendant in the former action would have been valueless, nor did the finding disclose any facts which would necessarily have reduced the plaintiff's loss below the amount due upon the forged note. *Held* no error.

[Argued October 28th, 1897—decided January 5th, 1898.]

ACTION to recover damages for the default of the sheriff of the defendant city, brought to the Court of Common Pleas for Fairfield County and tried to the court, *Carroll, J.*; facts found and judgment rendered for the plaintiffs, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

Section 21 of the charter of the city of Bridgeport, 10 Special Laws, 519, provides that "the sheriffs of said city

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shall severally have, within the limits of the jurisdiction of the City Court, the same power and authority, and be liable to the same suits or penalties for neglect of their official duty, to all intents and purposes, as sheriffs by law now have and are; and the said city shall be liable for the defaults of its sheriffs in their offices."

The complaint describes the default of the city sheriff as follows:—

"On said 17th day of September, 1894, the said Swan & Bushnell had a valid claim against one Edward Klaus of Bridgeport, Connecticut, to the amount of $240, which said claim was of such a nature that the body of said Klaus was liable to be attached therefor and have execution levied thereon to satisfy the same. On said day Swan & Bushnell, through their attorney, caused to be placed in the hands of said Dwight Thompson, a sheriff of said city of Bridgeport, a writ legally issued and signed, commanding him, the said sheriff, to attach to the amount of $400 the goods or estate of said Klaus, and in want thereof his body; and the sheriff being unable to find any property of the said Klaus, did attach his body to respond to the demand of said writ and took said body into his possession. Immediately thereafter, while the body of said Klaus was still in his possession, he, the said sheriff, negligently and carelessly permitted him, the said Klaus, to escape from his custody, and the said Klaus by means of said carelessness and negligence of the sheriff was enabled to so escape and did flee from said sheriff out of his jurisdiction and out of the State of Connecticut, where he has ever since remained. After said escape said sheriff made no further efforts to serve said process, and did not otherwise serve the same than as stated, and did not return said writ to the court to which it was returnable. The said Klaus owned no property of any kind that can be taken to satisfy this claim of said Swan & Bushnell, and by his said escape from said sheriff and by said misconduct and negligence of said sheriff as aforesaid described, the said Swan & Bushnell have lost their said claim and all chance to secure the same or to enforce payment thereof."

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The following are the material averments of the complaint of the plaintiffs against Klaus, and under which Klaus' body was attached as above described: "1. On the 20th day of May, 1894, the defendant obtained a loan of the plaintiffs to the amount of $240, and gave them therefor a certain note of that date for said amount, signed by R. Klaus, Mary Klaus, Fred. Hardy, and Marshall E. Gray, payable to the defendant's order and endorsed by him. 2. Said names of the makers of said note were forged and counterfeited. 3. The defendant at the time he obtained said loan upon said note knew that the said names were forged and counterfeited, but represented that they were genuine, with intent to defraud the plaintiffs. 4. The plaintiffs believed that said names were genuine, and relying upon said representation, they loaned the said defendant said money. 5. Said note is still unpaid and in the possession of the plaintiffs, and the defendant is wholly irresponsible."

The following facts found by the trial court are more or less material to the questions involved in this appeal: During the time of the dealings that the plaintiffs had with Edward N. Klaus, referred to in the complaint, the latter was conducting a saloon business in Bridgeport. Apparently he owned the saloon—that is, the stock in trade and fixtures—and he so told the plaintiffs when they first advanced him money. The plaintiffs believed that he owned the business which he was conducting, both in consequence of what he told them, and also in consequence of the way in which the business appeared to be carried on. As a matter of fact, during the latter part, at least, of the time Klaus conducted the saloon, a brewing company owned the saloon and its business, and paid Klaus a salary for his services. Either Klaus had bought the saloon and had sold it to the brewing company, while still continuing in charge of the business, some time before he absconded, or else he never owned it. The interest of the brewing company in the saloon was not known to the plaintiffs until about the time Klaus absconded. On February 20th, 1894, one Ernest Hockheimer, Jr., indorsed over to the plaintiffs a promissory note executed in his favor by Klaus.

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The plaintiffs paid Hockheimer $60 for the note. Its face value was considerably more than what the plaintiffs paid for it. Whether the note was then not due or was overdue, did not appear; nor did the nature of the indorsement appear, whether in blank, or with a waiver of demand and notice, or otherwise. On February 21st, 1894, the plaintiffs paid Klaus, $98.45 for a note in favor of Klaus, apparently given by one Marshall E. Gray, and indorsed by Klaus. The amount of this note and the time when it became due did not appear in evidence; nor did it appear whether demand or notice were waived in the indorsement of the note. Gray was known to the plaintiffs as an owner of real estate and other property. At this time Klaus told the plaintiffs, and they believed him, that the note to Hockheimer represented a part of the purchase price of the saloon business, which he said he had bought of Hockheimer, and that the Gray note represented goods that Gray had bought of Klaus. So far as Gray's signature to the note bearing his name was concerned, it was a forgery, and Gray did not owe Klaus anything. Klaus knew this note was forged. The plaintiffs bought and paid for the note in consequence of what Klaus said about his affairs, and because he said the note was given by Gray. On March 6th, 1894, the plaintiffs, also because of their belief in Klaus' ability and business condition, as represented by him, loaned him $30. On May 20th, 1894, the plaintiffs, who had been pressing Klaus for some time to pay the notes and the loan, told him that he must pay the moneys, all of which were then due them, or else he must do something to secure them. Klaus accordingly suggested that he get a note from his sister, Mary Klaus, who was known to the plaintiffs as owning property, and from Gray. The plaintiffs agreed to this proposition and wrote out a joint and several note for $240, which was the correct total amount due them upon the two other notes and from the loan, as then ascertained and agreed by the plaintiffs and Klaus, payable on demand after May 20th, 1894, to the order of Edward N. Klaus, at the office of the plaintiffs, for value received. The same day Klaus returned with the note apparently bearing the signa-

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tures of his sister Mary and of Gray, as makers, and of R. Klaus and of Fred Hardy, also apparently as makers, who, however, as he said, were witnesses. Klaus indorsed this note in blank, waiving demand and notice. The plaintiffs accepted the note in satisfaction of their other claims, under an understanding that he was to pay $10 a month on it until paid. At the same time they gave up to Klaus the other two notes, in consequence of their belief in the genuineness of the new note then received by them and given them by Klaus as a genuine note. Whether or not at that time Klaus had enough property to make it possible to collect the notes from him, did not appear. As a matter of fact, the signatures of Mary Klaus, Marshall E. Gray, and Fred Hardy on this note, were forgeries, and Edward N. Klaus knew them to be forgeries. What the plaintiffs did in the way of advancing moneys to Klaus, giving up notes, extending his time for payment, and altering their position generally in their dealings with him up to this time, had been done in consequence of his false and fraudulent representations as to his business affairs, and as to the names appearing on the notes. Two payments of $10 each were made on this last note. Early in September, 1894, the plaintiffs discovered that the names of the makers of this last note were forgeries.

On September 17th, 1894, the plaintiffs caused to be issued a writ, with its accompanying complaint, dated on that day, directed to the sheriff of the county of Fairfield, his deputy, or either sheriff of the city of Bridgeport, and returnable on the first Tuesday of October, 1894, to the Court of Common Pleas for Fairfield county. The writ was given to sheriff Thompson for service, on the day of its issuance. He served the writ on Klaus and attached his body, in default of finding attachable property. After keeping Klaus in his custody over night, the officer negligently and inexcusably permitted him to escape some time the next morning. The officer further negligently and without excuse omitted to return the writ to court, and made no return of his doings on the writ. Neither the plaintiffs nor their attorneys knew of the failure to return the writ to court, until long after its return day,

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and until too late to get judgment upon it. At the time the writ was served on Klaus, he had no property liable to attachment, so far as known to the plaintiffs, their attorney, or the officer. Before then he had some money, but how much it was or what became of it, did not appear in evidence. He was twenty-six years old. His mother owns some property. Upon his escape from arrest he left the State and went to parts unknown. His present whereabouts are unknown. The loss and damage sustained by the plaintiffs by reason of the officer's negligence, amount to $256.30; for which sum, that being the amount due upon said $240 note with interest, the court rendered judgment for the plaintiffs.

The following are among the reasons of appeal: "The court erred and mistook the law in holding and deciding that it did not devolve upon the plaintiffs to prove affirmatively that they were in fact actually damaged by the said officer's said neglect, and to further prove precisely the extent of such damage in order to recover at all. The court erred and mistook the law in holding and deciding that the plaintiffs were entitled to recover any damages by reason of said neglect of said officer, when it appeared upon the trial of this action, as shown by the finding, that the cause of action alleged and set up by the plaintiffs in their said writ and complaint against said Klaus, did not in fact exist, and that upon said writ and complaint, as the facts existed and are found in the finding in this action, the plaintiffs could not have recovered against said Klaus in said action at all, but, on the contrary, judgment in said action would have been rendered against them on said writ and complaint for the costs of said action. The court erred and mistook the law in holding and deciding that the plaintiffs were entitled in this action to recover damages for the said officer's neglect to serve and return said writ, upon the theory that some other cause of action might by amendment have been substituted for the cause of action alleged and set up in said complaint in said writ against said Klaus. The court erred and mistook the law in holding and deciding that the plaintiffs were entitled to recover as damages the full amount of said forged

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note, deducting the payments thereon made, when it appeared from the evidence, as shown by the finding in this case, that the said forged note was for a prior indebtedness already contracted and in existence when said note was given, and that said note, being on demand, was not the means of procuring from the plaintiffs any valuable thing, or placing the plaintiffs in any worse condition than they were in before, as regards their said claims against Klaus and his indebtedness to them."

Robert E. DeForest, for the appellant (defendant).

J. C. Chamberlain, with whom was *Elbert O. Hull*, for the appellees (plaintiffs).

HALL, J. Section 21 of its charter renders the city of Bridgeport directly liable for the defaults of its sheriffs in their offices and imposes upon them, within certain territorial limits, similar duties to those which are by law imposed upon sheriffs generally. Among the duties which a sheriff owes by law to plaintiffs in civil actions, is that of executing "with reasonable diligence according to its terms, all lawful civil process . . . duly delivered to him for service within his jurisdiction." Mechem on Public Officers, § 744. Section 1992 of our General Statues provides that "each sheriff shall receive all process directed to him when tendered, and execute it, and make return thereof," etc.

The facts of record show a default in office of city sheriff Thompson in negligently permitting Klaus, whom he had arrested under the civil process placed in his hands by the plaintiffs, to escape, and in neglecting to return the process to the court to which it was returnable.

Upon this appeal we are called upon to consider, (1) what the rule for damages is for such breach of duty of the city sheriff; and (2) whether under such rule, upon the facts found by the trial court, the plaintiffs could be entitled to a judgment for the amount due on the $240 forged note.

The language of the section of our statute, above cited,

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is: "If any sheriff shall not duly execute and return the process, or shall make a false or illegal return thereof, he shall be liable to pay all damages" to the party aggrieved. The law is well established that for such default in failing to execute the mandates of *mesne* process, the officer becomes liable to the injured party to the amount of the damage actually sustained. Mechem on Public Officers, §§ 759, 764; 2 Sedgwick on Damages (8th ed.), § 544; 1 Swift's Dig. s. p. 542. The amount of the debt is not necessarily the measure of such damages. It is the actual loss which the aggrieved party has suffered by reason of the officer's default. *Clark* v. *Smith*, 9 Conn. 379, 10 id. 1; *Palmer* v. *Gallup*, 16 id. 555; *Bank of Hartford County* v. *Waterman*, 26 id. 324. The acts themselves, of such defaulting officer, do not constitute the injury for which the law gives the plaintiffs reparation, but the damaging consequences of such acts. The injurious consequence is the interference with the plaintiffs' right to collect their debt by legal process.

To prove his damage, at least beyond a nominal sum, for a negligent escape or a failure to attach on *mesne* process, the plaintiff is ordinarily required to proceed and establish his debt by judgment; since judgment may be satisfied notwithstanding the failure to attach, or the defendant who has been permitted to escape may be produced in court to respond to final judgment; in either of which cases the plaintiff would have suffered no actual loss from the acts of the delinquent officer. 1 Swift's Dig. s. p. 543; *Bank of Hartford County* v. *Waterman*, *supra*. But the plaintiff having thus established his debt and his inability to collect it by legal process, has proved, *prima facie*, a liability of the defaulting officer to the extent of the debt thus established; and the burden thereupon rests upon the defendant to prove that the actual loss of the plaintiff was less than the amount of such debt. 2 Sedgwick on Damages (8th ed.), § 545 *et seq.*; Mechem on Public Officers, § 759; *State ex rel. Shirk* v. *Mullen*, 50 Ind. 598; *Hootman* v. *Shriner*, 15 Ohio St. 43; *Brooks* v. *Hoyt*, 6 Pick. 468.

In the present case it was impossible for the plaintiffs to

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prove their debt in their action against Klaus. They were prevented from doing so by the escape of Klaus beyond the jurisdiction of the court, and the failure of the officer to return the complaint to court. They are, however, required in this action to prove the judgment which they could have obtained in the action against Klaus, had the process been returned. This accords with the claim of defendant's counsel in his brief, that "the plaintiffs, in order to recover in this action, were bound to show, not only that said city sheriff Thompson neglected to attach the body of Klaus and to return said writ to court, but also that if said writ had been returned the plaintiffs would have recovered damages upon it."

But the defendant insists that the plaintiffs could not have recovered in their action against Klaus, had the complaint in that suit been returned. The cause of action described in that complaint, say defendant's counsel, was the obtaining of a $240 loan from the plaintiff, by false representations, and the facts show that no such cause of action existed; nor, says the defendant, can the plaintiffs avail themselves in this action of any right which they might have had to amend that complaint, had it been returned to court, since the defendant can only be held liable for the failure of the officer to serve the writ placed in his hands, and not a writ describing a different cause of action; and since the complaint in the present action counts solely "upon the neglect of the officer to serve and return the writ as it was placed in his hands." This argument of the defendant is, in our judgment, invalid.

The suit against Klaus was not to recover the $30 which the plaintiffs had loaned him, together with the sums they had advanced on the Gray and Hockheimer notes. The gist of that action was the fraud of Klaus in indorsing and delivering to the plaintiffs a forged note in satisfaction, by agreement of the parties, of a valid claim of $240 which the plaintiffs held against Klaus, and which was evidenced by the note for that amount set forth in the complaint and indorsed by Klaus. It was immaterial whether that valid

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claim was for money loaned, or was a sum due upon notes which Klaus had made or indorsed. The averment that Klaus had obtained a loan of the plaintiffs, was a matter of inducement which need not be stated with particularity nor strictly proved. 1 Chitty on Pleading (16th Amer. ed.), 296; 1 Swift's Dig., s. p. 604; Bliss on Code Pleading, § 311. Under the allegations of that complaint, proof of the indorsement and delivery to plaintiffs, for a valuable consideration, by Klaus, of the note which he knew to be forged, entitled plaintiffs to a judgment for the amount due by the terms of the note.

But we think that if the allegation that Klaus obtained a loan of the plaintiffs, be regarded as a material one, the facts show no fatal variance. The transaction was in effect the same as if the plaintiffs had loaned Klaus $240 upon the forged note, and he had thereupon paid the $30 which he owed them, and taken up the two notes upon which he was liable. If without taking that course the parties themselves preferred to treat the notes as money, and the new arrangement as a loan, they were permitted to do so. We think the transaction may be treated as such an agreement.

The finding discloses no facts which would have rendered a judgment against Klaus valueless, or which would necessarily have reduced the plaintiffs' loss below the amount due upon the forged note. From the record it does not appear that defendant offered any evidence for that purpose. Apparently the defendant relied upon its claim that it devolved upon the plaintiffs to prove that the judgment would not have been collectible. The trial court found the plaintiffs' damage to have been the amount due upon the forged note; that at the time the writ was served Klaus had no attachable property so far as was known to the plaintiffs, their attorney, or the officer; that "before then he had some money, but how much it was, or what became of it, did not appear in evidence." There is no finding that Klaus was insolvent.

As in our opinion the plaintiffs could have recovered judgment in their action against Klaus, without amending their complaint, it is unnecessary for us to determine whether

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they could have recovered in the present action had such amendment been required.

There is no error.

In this opinion the other judges concurred.

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JOHN W. SOUTHEY ET AL. *vs.* JOSEPH M. DOWLING ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action to recover the balance of the contract price for stone furnished, the defendants answered that they had been obliged to pay freight on the stone and also had been compelled to have a portion of the stone recut; and the parties were at issue as to how much was paid by the defendants for freight and what, if anything, was paid for recutting the stone. *Held* that under our present system of pleading the defendants could not avail themselves of the defense that the suit was prematurely brought; that such a defense was consistent with the truth of the material allegations of the complaint, and should have been pleaded in some form by the defendants if they intended to prove it.

Whether such a defense should be set up by way of a plea in abatement or by way of answer, *quære.*

[Argued October 28th, 1897—decided January 5th, 1898.]

ACTION to recover a balance claimed to be due for stone furnished, brought to the Superior Court in Fairfield County and tried to the court, *George W. Wheeler, J.;* facts found and judgment rendered for the plaintiffs, and appeal by the defendants for alleged errors in the rulings of the court. *No error.*

The complaint contained two counts. The first count alleged in substance: (1) that in May, 1895, the plaintiffs contracted with the defendants to furnish them with stone for use at Portchester, New York, as set forth in the bill of particulars filed under this count; (2) that the defendants agreed to pay for said stone $7,067; (3) that the plaintiffs

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furnished said stone as agreed; and (4) that the defendants had paid the plaintiffs $6,300 on account, but had refused to pay the balance.

The second count alleged that during the time the plaintiffs were furnishing stone as set forth in the first count, the defendants requested them to supply certain extra stone over and above the quantity described in the first count; and that the plaintiffs had furnished said extra stone to the amount of $915. An itemized bill of particulars was filed under this count.

The defendants filed the following answer:

"*First defense to first count.*

"1. Paragraphs 1, 2, 3 and 4 of the first count are denied, except as hereinafter admitted. 2. On or about May 11th, 1895, the plaintiffs contracted with the defendants to furnish the defendants with cut stone for use at Portchester, New York, for certain jobs taken by defendants, known as the 'Park Jobs.' 3. The defendants agreed to pay for said stone the sum of seven thousand and sixty-seven ($7,067) dollars, delivered f. o. b. at Portchester, N. Y. 4. The plaintiffs delivered said stone upon the cars at Portchester, but did not pay the freight thereon amounting to $430.18, which the defendants were obliged to pay; and a portion of said stone was not cut as agreed, and the defendants were obliged to have the same recut at a cost of $81.34.

"*First defense to second count.*

"1. All the allegations of the second count are denied, except as hereinafter admitted. 2. From time to time during the period in which the defendants were engaged upon the said jobs, they requested the plaintiffs to supply certain extra stone necessary for the completion of the various buildings, over and above the amount called for by the contract set out in the first defense to the first count. 3. The plaintiffs furnished stone as requested, to the amount of $223; the same being the item set forth in plaintiffs' bill of particulars in the second count, except items Nos. 1, 8, 9, 13 and

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14 of said bill of particulars, which the plaintiffs did not furnish to the defendants.

"*The defendants' second defense to first and second count, by way of set-off and counterclaim.*

"1. All the allegations of the first defense to the first count, and of the first defense to the second count, are made part of this defense. 2. The defendants claim an offset of the said sums of $81.34 and $430.18, paid by them as alleged in said first defense to the first count."

The plaintiff replied as follows:

"*To the first defense to the first count.*

"1. Paragraphs 2 and 3 of the defendants' first defense to the first count are admitted. 2. Paragraph 4 is denied, except as hereinafter admitted: the defendants paid freight charges for the plaintiffs, as alleged, but to what amount, the plaintiffs have not sufficient knowledge to form a belief.

"*To the second defense to the first and second counts, by way of counterclaim and set-off.*

"1. Paragraph 2 of the defendants' second defense to the first and second counts, is denied, except in this: that concerning the item of $430.18 by way of counterclaim, the plaintiffs have not sufficient knowledge thereof to form a belief."

That part of the finding which relates to the rulings complained of, is as follows: "Upon the trial the defendants offered to prove, and did lay in evidence the testimony of the defendant Charles Bottomley, that the agreement between the parties was that 20% of the price agreed upon for the stone furnished, was to be retained until such time as the building was accepted by the architect; and, in connection with this testimony, offered to prove that the building was not accepted by the architect until after this action was begun, and that the plaintiffs were notified of the fact that the building was not accepted at the time this suit was be-

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gun. In this connection the paper marked Exhibit 1*, for identification, was offered in evidence. The purpose of the offers was to prove that the suit was begun prematurely, and that nothing was due under the first count at the time the suit was begun. To these offers the plaintiffs objected, because the evidence, for such a purpose, was not admissible under the pleading; they had had no notice that this defense would be made and no opportunity to meet such a defense. The court ruled that all that transpired between the parties was admissible in evidence, but that the offer to prove the suit was prematurely brought was not admissible as a defense under the pleadings, and excluded the offers and Exhibit 1, for identification, for such a purpose, and the defendants duly excepted to the ruling. The above offer related exclusively to the first count."

The errors assigned relate solely to the rulings as above stated.

Daniel Davenport, for the appellants (defendants).

John W. Banks, with whom was *William T. Hincks*, for the appellees (plaintiffs).

TORRANCE, J. The question upon this appeal is whether, under the pleadings in this case, the defendants could avail themselves of the fact that the action was prematurely brought. At common law, matter of this kind, not appearing upon the face of the pleadings, was clearly matter in abatement. Matter which merely defeats the *present* proceeding and does not show that the plaintiff is *forever* con-

*DOWLING & BOTTOMLEY,
Masons, Builders and Contractors,
Office, 7 Wall Street.

BRIDGEPORT, CONN., Oct. 31, 1895.

Received of Dowling & Bottomley, note for seven hundred dollars to apply on contract for stone purchased for Park Job Purchase, said note to be renewed until such time as work is accepted by architect, interest on note to be paid by J. Southey & Son.

J. W. SOUTHEY & SON.

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cluded, should in general be pleaded in abatement. 1 Chitty's Pl. 446; 1 Swift's Dig. s. p. 606. The proceedings will abate "if it appear that the suit was commenced before the cause of action had accrued." 1 Swift's Dig. s. p. 610; 1 Chitty's Pl. 453; Gould's Pl. Chap. V. § 138.

It was, however, unusual to plead such matter in abatement, because if it appeared upon the face of the pleadings it could be taken advantage of by demurrer, and if it appeared by the plaintiffs' evidence it was ground for a nonsuit. 1 Chitty Pl. 453; Gould's Pl. Chap. V. §§ 137, 138. Whether under the later practice at common law, under the general issue in an action of assumpsit, the defendant could offer evidence to show that the suit had been prematurely brought, is not perhaps quite clear. Under the issues of "*non assumpsit*" and "*nil debet*," proof of almost every defense that would defeat the action was admissible. JUDGE SWIFT says: "In assumpsit, everything that proved there was no right or debt when the action was commenced, might be given in evidence under the general issue, for they were consistent with that plea." 1 Swift Dig. s. p. 614. In another place, p. 705, he says: "Every special matter of defense may be given in evidence under the general issue, excepting alienage after suit brought, tender, and the statute of limitations."

It is upon statements of this kind, in text books and reports, that counsel for the defendants seem to rely in support of their claim upon this appeal; but the question here is not whether at common law the offered evidence would have been admissible under the general issue, but whether under our present system such evidence was admissible under the pleadings in this case; and we are of opinion that it was not.

Under that system of pleading the defendant, in his answer, is required to state special matters of defense, and is not permitted to "give in evidence matter in avoidance, or of defense, consistent with the truth of the material allegations of the complaint, unless in his answer he states such matter specially." General Statutes, § 874. The rules un-

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der the Practice Act (Rule IV. § 6) also, provide as follows: "No facts can be proved under either a general or special denial, except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements, but show, notwithstanding, that he has no cause of action, must be specially alleged."

Under the pleadings in this case, leaving out of view the answer of set-off and counterclaim, the issues were, in effect: (1) how much have the defendants paid for freight; (2) what sum, if any, have the defendants paid for recutting stone; (3) what is the correct amount due for extra stone furnished. The defense that the suit had been prematurely brought, was clearly not within the issues. Whether, if the defendants had desired to make that defense, they should have set it up in a plea in abatement or in an answer, is a question which we need not discuss nor decide now; for it was not stated nor set up either by plea or answer. Clearly it was "matter in avoidance, or of defense, consistent with the truth of the material allegations of the complaint," within the meaning of the statute and the rule, and it was not stated at all. To allow the defendants, under these pleadings, to avail themselves of a defense of this kind, would be contrary both to the letter and the spirit of our present system of pleading.

Under systems of pleading in other States, substantially similar to our own, it has been, so far as we know, uniformly held that a defense of this kind, which the defendant attempts to prove by evidence, is not available to him, unless he has in some way set it up in his pleading. *Goodrich* v. *Atlanta B. & L. Asso.*, 96 Ga. 803; *Collette* v. *Weed*, 68 Wis. 428; *Iselin* v. *Simon*, 62 Minn. 128; *Elder* v. *Rourke*, 27 Or. 363; Pomeroy's Rem. & Remedial Rights, §§ 673, 691, 698; 1 Ency. Pl. & Pr. pp. 839, 849, and cases there cited.

There is no error.

In this opinion the other judges concurred.

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MARY J. NOLAN, ADMINISTRATRIX, *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Inferences or conclusions of the trial court which result from sifting and weighing evidence and the credibility of witnesses, are matters of fact which this court cannot review; but the inference or conclusion drawn by the trial court from these specific, adjudicated facts, of legal liability, and of subordinate conditions essential to legal liability, are matters of law reviewable by this court upon appeal, where all the adjudicated facts appear of record.

The plaintiff's intestate was killed in a rear-end collision upon the defendant's railway, which was alleged to have been caused by its negligence in failing to give telegraphic information to each of the colliding trains, of the position of the other, and in failing to exercise proper supervision of the movement of said trains. From the special facts found, the trial court inferred that the rules and regulations of the defendant did not sufficiently provide for the emergency, and for the reasonably safe operation of the colliding trains, and held the defendant guilty of negligence in this respect. These rules and regulations formed a part of the record, and the trial court found that for the general movement and operation of trains they were the best and safest general rules yet devised by the best railroad talent in the country. *Held*:—

1. That the inference of the trial court as to the existence of an emergency and the adequacy of the rules, was, in view of all the facts stated in the record, a conclusion in respect to a matter of law, and therefore reviewable by this court.
2. That the giving of telegraphic information to the colliding trains was not, upon the facts specially found, a duty imposed upon the defendant by law; and consequently its failure to give such information violated no legal right of the intestate.
3. That the conditions attending the colliding trains did not differ essentially from those generally attending trains moving in the same direction, and did not create an exceptional situation or emergency unprovided for by the rules.

In some instances it is impracticable for the trial court to set forth its inferences from testimony in a clear, detailed statement of adjudicated facts; and in such cases, although the inference of liability drawn by the trial court is one of law, yet it cannot be reviewed by this court, because the fact or facts upon which it rested cannot be transferred from the mind of the trier to the mind of the appellate

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court; and the inference is therefore, practically, a conclusion of fact.

A railroad company is bound to enforce as well as to adopt adequate rules for the movement of its trains.

The rule exempting the master from liability for an injury to one of his servants caused by the negligence of another, is too firmly established to be reversed or seriously modified by the judicial power.

The case of *Sprague, Admx., v. New York & New England Railroad Co.*, 68 Conn. 345, explained and distinguished.

[Argued October 29th, 1897—decided January 5th, 1898.]

ACTION to recover damages for personal injuries resulting in the death of the plaintiff's intestate, brought to the Superior Court in Fairfield County and heard in damages to the court, *George W. Wheeler, J.;* facts found and judgment rendered for the plaintiff for $5,000 damages, and appeal by the defendant for alleged errors in the rulings of the court. *Error.*

The facts on which liability is claimed, are alleged in the third and fourth paragraphs of the complaint. The third paragraph avers that on March 12th, 1896, the defendant ran a freight train south on its road and followed that train with a snow plow and engine, and while so operating said trains was negligent "in failing to give proper telegraphic information to the conductor and engineer of each of such trains, relative to the position of the other of said trains; by failing to give proper orders to the conductor and engineer of each of said trains; by running the said rear or snow-plow train at a high and dangerous rate of speed; by failing, when the said freight train, as hereinafter stated, was left standing upon the main track, to give sufficient and timely signal and warning to the approaching aforesaid snow-plow train; by failing to have upon the said freight train a sufficient number of men to do the freighting work required of the train crew, and also to guard against collision; by failing to have sufficient and serviceable brakes upon the snow plow and locomotive composing the snow-plow train; by using and putting into said snow-plow train a plow so huge and improperly constructed that it obstructed the engineer's view of the tracks in dangerous places on said railroad, and while approaching the place where the collision, hereinafter

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stated, occurred; by having in the said snow-plow only such windows as were too small and inconveniently placed to serve properly for lookout purposes; by failing to have a proper, certain and speedy means of signalling from the snow-plow to the engineer of the locomotive; by failing to exercise proper supervision of the running of said trains; so that the said snow-plow train collided with the said freight train at a place on said railroad in the town of Kent, near the Kent Furnace switch, and as a result of such collision the plaintiff's intestate, Jerry Nolan, received severe injuries, which injuries were aggravated by exposure and rough treatment, made necessary by the negligence of the defendant in failing to have upon the said snow-plow train a hospital stretcher, as the law required. In consequence of the aforesaid injuries the said Jerry Nolan died. *Fourth.* At the time of the said collision the said freight train, with the exception of the locomotive, was standing upon the main track near the Kent Furnace switch, in the town of Kent, the same track upon which the snow-plow train was approaching. The locomotive of the freight train had been detached and was working on a side track. The said snow-plow train, coming at a terrific rate of speed, crashed into the rear end of the freight train. The said Jerry Nolan was rightfully within said snow-plow, which, by the force of the collision, was crushed in upon him, inflicting severe injuries."

The finding states the facts on which the judgment is founded, as follows: "1. On March 12th, 1896, the defendant was a duly organized corporation under the laws of the State of Connecticut, and was operating its single track road with sidings and switches, extending from the city of Bridgeport in the State of Connecticut, to the city of Pittsfield in the State of Massachusetts, and forming a part of what is known as the Berkshire Division of the defendant. 2. At all of the regular stopping places for trains, with three exceptions, the defendant maintains a telegraph office, and the departure of all trains from stations having a telegraph office is at once telegraphed to New Haven to the

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train-despatcher. 3. At all of the regular stopping places for trains, with three exceptions, the defendant maintains a time board upon which the station agent places in large figures the time of departure of each train from these stations. The time board apprises the conductor and engineer of each train of the time of departure of the train last at the station and going in the same direction, and these officials rely upon such information in regard to the position of trains in advance, in the absence of special order. 4. The movement of all trains upon this division was in the exclusive control of the train-despatcher at New Haven. Conductors and engineers and all officials were bound to obey his orders. He acted in the name, by the authority, and in the place of the defendant. 5. The division superintendent ordered trains to run, and the train-despatcher gave the running orders by telegraph. 6. The train-despatcher had at all times the location of every train, regular and extra, running upon this division, as they passed the telegraphic stations, and knew at what stations or places each train was to stop, and about the length of time it would be required to stop. 7. Whenever special orders to control the movements of trains are necessary, the train-despatcher at New Haven sends such orders by telegraph to the operator located at a station which such train is approaching, and the operator hands a copy of said order to the conductor and a copy to the engineer of said train. 8. On said day the regular way freight, known as 1411 and so designated hereafter in this finding, started from Great Barrington at 5:30 A. M. It gradually fell behind its schedule time and at Falls Village was considerably late. Freight trains are often late, and every one connected with the operation and movement of defendant's trains knew this. 9. At Great Barrington the conductors received an order from the division superintendent to stop at Kent Furnace and attach to 1411 three freight cars on a siding there. 10. Kent Furnace is between North Kent and Kent, and is nothing but a railroad siding where freight trains occasionally stop, but only upon orders from the division superintendent. There is no station, no station

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agent, no telegraph or time board there. There are only two other places on this division where freight trains stop, similar to this place, *viz.:* Trumbull Ice Pond and South Glendale. Kent Furnace is an unusual stopping place, not named upon the official time-table in use by defendant's employees. 11. Freight 1411 ran at the rate of from 20 to 25 miles an hour, the usual speed of freight trains, and when it left Cornwall Bridge at 10:28 A. M., its last stopping place, and the last station at which telegraphic orders could have been issued to it, it was 1 hour and 18 minutes behind its regular schedule time. 12. The only station between Cornwall Bridge and Kent is North Kent, where they have no telegraph, and where 1411 was not required to stop and did not stop on this day. 13. Kent Furnace is about 7 miles, and Kent about 8½ miles, from Cornwall Bridge. 14. Freight 1411 reached Kent Furnace about 10:50 A. M., and while the train remained on the main track the engine began the work of getting the three freight cars from the siding to the main track. 15. The usual running time for the freight train between Cornwall Bridge and Kent Furnace, where no stop is made at North Kent, is 21 minutes; and the usual stopping time to do the work at Kent Furnace is 15 minutes. 16. The work at Kent Furnace on this morning would have taken the usual stopping time, 15 minutes. 17. Between 5:30 and 6 A. M. an extra train known as 474 and hereafter in this finding so designated, consisting of a snow plow, locomotive and tender, the snow plow being ahead of the locomotive and tender and pushed by the locomotive, left Pittsfield for the purpose of clearing the track of defendant of snow. 18. Train 474 ran at about 40 miles an hour and steadily gained on 1411. In order that 474 should do effective work it was necessary that it run between 35 and 40 miles an hour. 19. Train 474 received telegraphic orders at Falls Village to run extra to New Milford. New Milford is the fourth station below Kent. This gave 474 the right of the track to New Milford, keeping ten minutes off the time of all regular trains. Thereafter train 474 ran under this order, which was in accordance with the rules.

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When 474 reached a station and the time board showed that the last train at the station had departed ten minutes or more before, 474 might continue its run, in the absence of special order. 20. Train 474 passed Cornwall Bridge at 10:52 A. M., 24 minutes behind freight 1411, under the order recited in paragraph 19, *supra*. 21. Train 474 knew freight 1411 had passed Cornwall Bridge at 10:28. 22. Train 474, under the rules of defendant, had the right to proceed, and under the order recited in paragraph 19 was bound to proceed, and did so, running at the rate of 42 miles an hour. 23. Train 474, and no one on board of her, knew that 1411 had received orders to stop at Kent Furnace; the conductor in charge and the engineer knew from the order that 474 had the right of track to New Milford. 24. No one in charge of or on 1411 knew officially that 474 was in the rear; the conductor and rear brakeman had heard the night before that 474 would be out in the morning, but had no information that 474 was in fact out. No one on 1411 knew the location of 474 at any time on said day. The conductor of 1411 had cautioned rear brakeman, Hall, at West Cornwall, the station just north of Cornwall Bridge, to look out for 474, but gave him no further caution or order. 25. No order was received by those in charge of 474 or 1411, of the location of either of said trains or of any fact relating to either train. 26. The train-despatcher knew that 474 must overtake 1411 either at Kent Furnace or on the track before reaching Kent, and all of the foregoing facts except those in paragraphs 1, 14, 16 and 24, and in the last two lines of paragraph 18, were known, or ought to have been known, to him, as well as those contained in paragraphs 49 to 53 inclusive. 27. The snow plow on 474 was in charge of plaintiff's intestate, the assistant roadmaster of defendant, who was engaged in working the flanges, the appliances used in cleaning the tracks; lifting them when they came to bridges, switches, etc., and lowering them thereafter. 28. Within the front part of said snow plow was a small elevation above its main floor, known as the observatory or cupola, and from which, through two circular windows about

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fifteen inches in diameter, the track could be seen. The snow plow was so constructed that it prevented a view ahead of the engine by the engineer. 29. Rule 104 of said defendant, for the movement and operation of trains, provides that, 'when a train is being pushed by an engine, a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman.' 30. The cupola was designed to carry two men, one to work the flanges, and one to act as a lookout. 31. Between West Cornwall and Kent Furnace no one was in the cupola as a lookout or flagman; the assistant superintendent of the division was in said cupola watching the working of the plow, for which purpose he boarded the plow at Falls Village. 32. In the small compartment on the main floor of the plow was a stove, and nine men who were laborers, to shovel snow in case of a drift, and other employees of defendant. 33. Said day was very cold and the snow plow threw the snow considerably, rendering it difficult to see ahead; just before the accident the plow was not throwing much snow, and a lookout could see through said two windows. 34. During the trip from Pittsfield an employee, by direction of the conductor, had cleaned the two windows in the cupola every time 474 stopped; it was impossible to clean them while the train was in motion, and these windows had not been cleaned since 474 stopped at West Cornwall, 18 minutes before. 35. After 1411 stopped at Kent Furnace the rear brakeman, Hall, went up the track to flag 474. Rule 97 covered all the duty devolving on Hall, and provides: 'When a schedule freight train is detained at any of its usual stops beyond its leaving time, when the rear of the train can be plainly seen from a train moving in the same direction at a distance of at least *twenty telegraph poles*, the flagman must go back with danger signals not less than fifteen telegraph poles, and as much farther as may be necessary to protect his train; but if the rear of his train cannot be plainly seen at a distance of at least *twenty telegraph poles*, or if it stops at any point that is not its usual stopping place, *or if an extra* train

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is stopped at any point, the flagman must go back not less than *twenty telegraph poles*, and if his train should be detained until within *ten* minutes of the time of a passenger train moving in the same direction, he must be governed by Rule No. 99.' The employees of defendant occasionally violated this rule, and the conductor in charge of 1411 knew this. Trains sometimes stopped so short a time that a strict compliance with the rule was impossible, unless the brakeman was left behind, which sometimes occurred. No. 474 was an extra train, and Hall's duty under the rules was to go back twenty telegraph poles and flag the same; this was a distance of 3,000 feet, the telegraph poles being 150 feet apart. Hall went up the track about 600 feet, when train 474 rounded a sharp curve. 36. The assistant superintendent saw Hall running up the track and flagging, as soon as he could have been seen from 474, and when 474 was about 600 feet from Hall, he jumped from the cupola to the compartment and motioned the conductor to stop the train; the conductor at once jumped upon the cupola and pulled the bell rope twice, but it did not ring the bell in the engine cab; this bell rope connected with the engine, and the engineer relied upon it to warn him of danger ahead. 37. The engineer saw around the sharp curve, from the right hand side of his cab, flagman Hall, when about 300 feet ahead, and he at once did all that he could do to stop 474 by reversing and applying brakes to engine and tender. 38. There was no air brake on said plow, the only brake being a hand brake. 39. Train 474 slowed down in running the 900 feet to train 1411, after flagman Hall was seen; it was running about 20 miles an hour when it struck the rear of the freight train as it stood on the main track; it plunged through three freight cars before it stopped. The collision occurred at 11:02 A. M., ten minutes after 474 passed Cornwall Bridge. 40. As a result of the collision the conductor of 474 was killed, some of the men in the compartment were injured, and the plaintiff's intestate was fatally injured. He lived about two or three hours after the collision, suffering greatly and then died. He was 51 years of age, in good

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health, and was at the time of his death and for some time before had been, the assistant roadmaster of the Berkshire Division of the defendant, having been employed on this division some 30 years. 41. Had the engineer been notified through the bell, of the flagman ahead, and had he then done all he could to have stopped the train, the collision could not have been avoided, but probably its force and extent might have been somewhat modified. 42. There was no negligence on the part of any of the employees of train 474, or of train 1411, except rear brakeman Hall. 43. Said train 474 was properly equipped and its appliances in good order, except that it had no hospital stretcher on board as required by statute, and no air brakes on the snow plow; its appliances were in good order except the said bell cord and bell. Train 1411 and its appliances were proper and in good order. 44. The absence of the hospital stretcher in some degree increased the sufferings of the plaintiff's intestate, who had to be removed on boards for some distance, but did not cause his death. 45. Train 474 could have been stopped in about 1,500 feet, or the distance of ten telegraph poles. 46. Had the rear brakeman gone back twenty telegraph poles and signalled, and had those in the cupola or on the engine of 474 seen him and done their duty, the collision would not have occurred. 46½. The rear brakeman had about time to have gone back 3,000 feet after 1411 stopped at Kent Furnace, but not time enough to have returned to 1411, nor to have returned within the ordinary time of stopping at Kent Furnace. 47. The rules or regulations for the movement and operation of trains, adopted and used by the defendant, were substantially the same as those adopted by the American Railway Association, after protracted conferences, and revised from time to time at the semi-annual meetings of this association. About ninety per cent. of the steam railways of this country are using these rules, with such modifications as adapt them to the particular railway. 48. For the general movement and operation of trains these rules are the best and safest general rules yet devised by the best railroad talent of the country. 49. The only protection

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afforded by these rules to trains 474 and 1411, to prevent their colliding, was the rule quoted in paragraph 35, *supra*. These rules did not, and are not intended to, cover all emergencies; these call often for special orders. 50. No order had been sent 474 or 1411 when they should meet, and it was certain they would meet unless 474 was stopped before 1411 reached Kent. It was a part of the train-despatcher's duty to notify trains, not regulated by the time tables and rules, in advance, where they would meet, so that they might know this fact and collisions be avoided. Ordinary care required such orders, and in his failure to notify trains 474 and 1411 of this, he was negligent. 51. Train 474 was a special and irregular train, run for an unusual purpose, for the first time the morning in question. The circumstances of this case were unusual, and presented an emergency which probably no general code of rules could provide for, and the rules in question did not provide for; it required special orders and special instructions to trains 474 and 1411, so that train 474 should not collide with 1411 between Cornwall Bridge and Kent. 52. Extra trains are run daily over said division, averaging from 8 to 15, and some days as high as 20. 53. It would be impracticable to operate extra and regular trains entirely by special orders. In cases of emergency this must be done, and general rules cannot cover them. The meeting places of trains not upon the time-table, and of regular trains off the regular time, is provided for by special orders, and not governed by the printed rules. 54. Those in charge of 474 and 1411, and rear brakeman Hall, were familiar with the rules and knew that in ordinary cases the rules and not special orders would govern the movement of all trains on the division. The defendant had exercised ordinary care in the selection of all its employees on trains 474 and 1411. 55. On March 20th, 1896, the plaintiff was duly appointed administratrix of the estate of said Jerry Nolan, and duly qualified. 56. Written notice of a claim for damages was made in conformity to the statutory provision. 57. Time-table No. 23 and the rules (Ex. B.) are made a part of the record, but need not be printed; copies of the same may be

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handed to the judges of the Supreme Court of Errors. 58. I find, as a fact, that these rules did not sufficiently provide for this emergency, and for the reasonably safe operation of trains 474 and 1411. This emergency required the exercise of great care by the defendant, since the danger of collision was great. 59. I find, as a fact, that the defendant was negligent in not providing for this emergency, and for the safe operation of trains 474 and 1411, by special orders and instructions, in addition to the general rules, and that this collision resulted from the defendant's failure to so provide. 60. I find, as a fact, that the operation of these trains under these general rules alone, under the circumstances of this case, was not a suitable and safe method to operate these trains. 61. I find, as a fact, that the train-despatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains. 62. I find, as a fact, that the injury to plaintiff's intestate resulted from the combined negligence of rear brakeman Hall and of the defendant. 63. I find, as a fact, that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411. 64. I find, as a fact, that the plaintiff's intestate was not guilty of any negligence contributing to his injury or death."

The finding also states the defendant's claims of law, as follows: "1. That if the collision occurred through the negligence of rear brakeman Hall, the plaintiff was entitled to nominal damages only, because Nolan, the plaintiff's intestate, and said rear brakeman were fellow-servants. 2. That upon the facts in evidence, the defendant having operated its trains under suitable rules and regulations, and having properly equipped such trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it. The court sustained the defendant's first claim, but did not pass upon its second claim, except to find, as a matter of fact from the evidence submitted, that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions by way of special orders,

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to those provided in the rules for the reasonably safe operation of these trains."

The defendant assigns as reasons of appeal, error in the ruling on its second claim of law; also error in inferring from the facts found, the conclusions stated in paragraphs 58 and 63 of the finding, and error in certain of the conclusions of fact from the testimony given on the trial, a copy of which testimony is certified and made a part of the appeal record.

Goodwin Stoddard and *William D. Bishop, Jr.*, for the appellant (defendant).

None of the material facts in this case, either on the trial or in making up the record, were disputed. The manner in which the collision occurred, the relative positions of the two trains prior to the collision, the official information which each train had of the location of the other, the existence of printed rules and the familiarity of the employees with them and their duties under them, the failure of the rear brakeman to observe the rules, the knowledge of the train-despatcher of the situation of the two trains, and his conduct in view of the situation, and, in general, all of the facts and circumstances surrounding the collision, were absolutely undisputed. It remained only for the trial court to determine whether the conduct of the defendant, under the conceded circumstances, was what we should expect of a man of ordinary care under such circumstances. To reach a conclusion in the matter required a consideration and determination of it as a question of law. *Sharp* v. *Lockwood*, 12 Conn. 159; *Belden* v. *Lamb*, 17 id. 451; *Schoonmaker* v. *Machine Co.*, 51 id. 392; *Nolan* v. *R. R.*, 53 id. 471; *U. P. R. Co.*, v. *McDonald*, 152 U. S. 282; *Morrissey* v. *Bridgeport Traction Co.*, 68 Conn. 215. The question is, was it the duty of the defendant to perform the acts required of it by the trial court? This has always been held to be a question of law, and the fact that the trial court has in so many words determined it as one of fact, is not effective to make it such. *Nolan* v. *R. R.*, 53 Conn. 471; *Sprague* v. *R. R.*, 68 id. 345;

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Morrissey v. *Bridgeport Traction Co.*, *supra*. In cases similar to the present one the reasonableness of rules and regulations has been held to be a question of law, and not of fact. *South Florida R. Co.* v. *Rhodes*, 25 Fla. 45; *Wolsey* v. *R. R.*, 33 Ohio St. 234; *Vedder* v. *Fellows*, 20 N. Y. 130; *Memphis, etc., R. Co.* v. *Graham*, 94 Ala. 556; *Ill. Cent. R. Co.* v. *Whittemore*, 43 Ill. 423; *Louisville R. Co.* v. *Fleming*, 14 Lea (Tenn.), 145; *N. & W. R. Co.* v. *Wysor*, 82 Va. 261; *Chilton* v. *R. Co.*, 114 Mo. 91; *Avery* v. *R. Co.*, 121 N. Y. 44; *St. L. R. Co.* v. *Adcock*, 52 Ark. 410; *Kansas City R. Co.* v. *Hammond*, 58 Ark. 334; *Hoffbauer* v. *R. Co.*, 52 Iowa, 343; *Enright* v. *R. Co.*, 93 Mich. 409; *Abel* v. *R. R.*, 103 N. Y. 587; *Pittsburg R. Co.* v. *Lyon*, Pa. Superior Ct. Jan. 1889. The *proximate cause* of this unfortunate accident was the failure of the rear brakeman to observe the rules, and the fact that now, with this experience before us, we are enabled to suggest innumerable precautions which, if adopted by the defendant, *might* have averted this collision, furnishes no just ground for holding that the exercise of reasonable care required their adoption. *Hayes* v. *R. Co.*, 57 Mass. 274; *Enright* v. *R. Co.*, 93 Mich. 409; *Ill. R. Co.* v. *Neer*, 31 Ill. App. 126; *R. Co.* v. *Lang*, 118 Ind. 579. It should not be forgotten that both of these trains were operated strictly in accordance with the rules; that a notice to them from a train-despatcher, of the character deemed necessary by the trial court, would have been an unusual and dangerous departure from the rules; and that an observance of said rules by the rear brakeman would have averted the collision.

John Cullinan, Jr., and *Thomas M. Cullinan*, for the appellee (plaintiff).

The negligence of the defendant was a question of fact for the conclusive determination of the trial court. This very question, whether under certain circumstances special instructions and orders, in addition to the general rules, are required, was adjudged to be a question of fact in *Sprague* v. *New York & N. E. R. Co.*, 68 Conn. 347. See also *Fritts* v. *N. Y. & N. E. R. Co.*, 62 Conn. 503, 508; *Donovan* v. *Hart-*

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ford St. R. Co., 65 id. 201–214; *Dundon* v. *N. Y., N. H. & H. R. Co.*, 67 id. 266, 269; *McAdam* v. *Central Ry. & Electric Co.*, ibid. 445; *Heenan* v. *Bridgeport Traction Co.*, ibid. 594. The question of negligence in this case was a complex one to be determined from a great number of facts and conditions produced in evidence. It is apparent that the law cannot supply a legal deduction which may be applied to any array of facts, which would be necessary if its determination of the question of negligence in this and similar cases were a question of law. The case did not turn upon the standard of duty to be applied, but upon the conduct of the defendant; and the learned court, knowing the degree of prudence required by law, concluded from the evidence that the conduct of the defendant was not what the conduct of a prudent man would have been under like circumstances. *Peltier* v. *Bradley, D. & C. Co.*, 67 Conn. 49; *McAdam* v. *Central Railway & Electric Co.*, ibid. 447. If train 474 had not collided with train 1411 at Kent Furnace, and if train 1411 had done its work there and started on toward Kent—there being no time board at Kent Furnace to inform train 474 when 1411 departed—then, according to the finding of the court, which the defendant does not dispute, train 1411 must inevitably have been overtaken by train 474 before reaching Kent, and while both trains were in motion, when no duty devolved on brakeman Hall. Certainly the negligence of the company could not be questioned then. That the trains met before this, when a duty of brakeman Hall was neglected, does not relieve the company of negligence. The relation of the defendant company to the supposed situation and to the actual situation, is the same. Both trains were moving on the same orders and instructions in the actual situation, as they would have been in the supposed. The negligence of the railroad company was present at least from the time that the trains, especially 474, were allowed to pass Cornwall Bridge, the last place that they could have been reached by telegraph, without additional orders and instructions. If the negligence of the company contributed it must necessarily have been an immediate cause of the accident, and it is no

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defense that another was likewise guilty of wrong. *Grand Trunk Railway Co.* v. *Cummings*, 106 U. S. 702; *Wilson* v. *Willimantic Linen Co.*, 50 Conn. 433; *Sprague* v. *N. Y. & N. E. R. Co.*, *supra*; *Elmer* v. *Locke*, 135 Mass. 576; *Cowen* v. *Del., Lack. & West. R. R.*, 81 N. Y. 206; *Crowell* v. *Thomas*, 90 Hun, 198; *Paulinier* v. *Erie R. Co.*, 34 N. J. L. 155; *Rogers et al.* v. *Leyden*, 127 Ind. 50; *Young* v. *S. H. & H. Iron Co.*, 103 Mo. 324; *Sherman* v. *Menominie River L. Co.*, 72 Wis. 127.

HAMERSLEY, J. The finding of facts upon which judgment is founded, contains a statement in detail of inferences produced, in whole or in part, by weighing evidence and the credit to be given witnesses, and also of the conclusions drawn from these inferences. The former are called facts, as denoting adjudicated facts which can only be retried by an appellate court having jurisdiction in the trials of such facts. This court does not have appellate jurisdiction of that nature; the Superior Court is the court of last resort for that purpose, and its adjudication of such facts, in the exercise of original or appellate jurisdiction, is the end of litigation; unless in the process of adjudication it has violated some rule or principle of law. *Styles* v. *Tyler*, 64 Conn. 324; *Thresher* v. *Dyer*, 69 id. 404, 408. The alleged failure to determine such facts correctly, is improperly assigned in the appeal as error, and cannot be considered. The request of counsel, for the certification of testimony in support of such claimed errors, is an abuse of the provisions in respect to certifying evidence. *Thresher* v. *Dyer*, *supra*.

The latter, that is, conclusions drawn from such facts, are also called facts, but with a much broader signification, including all issues that the line separating the province of the jury from that of the judge in a jury trial practically leaves to the jury. The word fact, used in this broad sense, does not accurately denote matters not reviewable by this court. In defining facts as denoting those questions practically within the province of a jury, we are controlled not only by established practice, but by the constitutional pro-

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vision forbidding any violation of the political "right of trial by jury." In defining facts as denoting questions not reviewable by this court, we are controlled by "the primary distinction drawn by the Constitution, between the jurisdiction original and appellate of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial." *Atwater* v. *Morning News Co.*, 67 Conn. 504, 526. "The true distinction as drawn under our system of jurisprudence, in connection with this provision of the Constitution, between facts that the trial court must find from the testimony, and the application of principles of law based upon such facts," includes "questions of law" as distinguished from "questions of fact" in a jury trial, but is not fully expressed by that distinction. While the jurisdiction of this court may be affected in its practical operation by existing procedure or practice, the jurisdiction itself, "is coextensive with the judicial power of the State in all matters wherein legal principles, that is, rules of law or principles of equity, appear to have been erroneously or mistakenly determined by a trial court." *Styles* v. *Tyler*, *supra*, 454. The limitations of procedure formerly existing, in connection with the practice followed in view of that procedure, prevented in some instances the full exercise of our jurisdiction; and the conclusions of trial courts,—because not presented in such manner as to be reviewable under existing procedure and practice,—have been spoken of in language appropriate enough for that purpose, as questions of fact. But whenever the record before us has legally presented all the facts found by the trial court as the basis of its judgment, and the conclusion drawn from those facts has been plainly erroneous, and such error has been lawfully assigned, we have uniformly held such conclusion, although for some purposes it might be called a question of fact, to be, *quo ad* the jurisdiction of this court, a question of law; *i. e.*, it is reviewable.

When the finding of facts states evidence, so that the conclusion must be reached by weighing evidence, the find-

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ing is essentially a report of evidence and not a statement of facts adjudicated, and the question of legal inference from facts that may be involved, is irregularly presented. *Corbin* v. *American Mills*, 27 Conn. 274, 278. In *Bloodgood* v. *Beecher*, 35 Conn. 469, the judges were equally divided upon the question whether, upon the finding of facts in that case, the intention of a mortgagor to prefer the mortgagee to his other creditors, could be drawn by this court as a conclusion of law; HINMAN, C. J. and PARK, J., holding that it could not, and BUTLER and CARPENTER, JS., holding that it could. The case was decided by the second vote of the Chief Justice. In *Mead* v. *Noyes*, 44 Conn. 487, the trial court, in an action of replevin, spread upon the record the facts from which it drew its conclusion that the plaintiff was the owner of and entitled to immediate possession of the property replevied; and, upon motion in error, this court reversed the judgment because the conclusion from the facts found was an error in law. In *Hayden* v. *Allyn*, 55 Conn. 280, 289, Judge LOOMIS, speaking for the court, laid down the broad principle that whenever in trials to the court the judge has fully weighed the testimony and passed upon the credit of witnesses, and specifically found as the basis of his judgment the inferences produced by the testimony, so that the evidence "had exhausted itself in producing the facts thus found, nothing remained but for the court in the exercise of its legal judgment to draw its inferences from the facts;" and "in such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law and not an error in an inference of fact." This principle was deliberately affirmed in *Tyler* v. *Waddingham*, 58 Conn. 375, 386, and applied to a special finding of facts from which was drawn the conclusion that the plaintiff, at the time of making a contract with a partnership, elected to give exclusive credit to a single partner. In *Ward* v. *Ward*, 59 Conn. 188, 197, the principle is recognized as established, although its application in that case is treated with some subtilty. The principle may at times be misapplied, but a mistake of this kind cannot shake its au-

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thority. It is not only supported by the true *ratio decidendi* of a long line of decisions, but is embedded in the very structure of our system of jurisprudence. Settling the credit of witnesses; weighing evidence; ascertaining the truth from conflicting testimony or incongruous evidential facts;—this is the peculiar province of, and under our system within the exclusive jurisdiction of, trial courts, and a mistake in the inference produced by such means is an error in fact; when such facts are adjudicated, a mistake in drawing the legal inference, *i. e.*, in applying the law to the facts found, is an error in law.

The application of this principle has been hampered and its meaning somewhat obscured, through inadequate and uncertain methods for bringing into action the jurisdiction of this court. Sometimes the conclusion of a trial court from conceded facts is so clearly right that practically no question is presented, and in such cases we have said that the conclusion is one of fact properly decided; yet if in such cases the conclusion, instead of being clearly right, had been a palpable *non sequitur*, we would have reviewed it as a question of law, unless the question were irregularly presented. But more frequently the alleged error in a conclusion from conceded facts has been irregularly presented; either through mistake in making up the record, or through defect in methods for obtaining a record which should properly present the question; and in such cases we have said that the conclusion is one of fact not reviewable. Such indeterminate use of the phrase "question of fact," or "conclusion of fact," must be taken in connection with the circumstances of each case, and cannot be treated as precisely distinguishing those conclusions which are to be treated as facts in respect to the jurisdiction of this court, nor as modifying the settled principle that the unwarranted conclusion of a trial court in drawing its inference from the special facts which, in compliance with existing law of procedure it has found for the purpose of drawing that inference, is essentially an error in law.

For many years, and especially since 1879, the legislature

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has endeavored by means of various statutes to modify the law of procedure, so as to require a trial court to place upon record the special facts on which its judgment is founded, and to enable this court to exercise its full jurisdiction in reviewing the legal judgment of a trial court in drawing its inference from conceded facts. Such legislation has considerably enlarged the facilities for exercising the jurisdiction of this court. The effect of this legislation has been the subject of frequent consideration, and the main general conclusions reached are summarized in *Thresher* v. *Dyer*, *supra*, and *Winsted Hosiery Co.* v. *New Britain Knitting Co.*, 69 Conn. 565, 575. In the latter case we say: "The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trier, is a conclusion of law, and as such reviewable by this court; and this is true whether such facts are settled by a special verdict of a jury or by a special finding of a judge." And referring to the changes in procedure: "We think that the result of this legislation is, that in cases tried to the court the judge is now authorized, and upon request required, to find and state in a special finding the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the ultimate conclusion and subordinate conclusions involved therein, by force of settled rules and principles of law. The judgment rendered on such an adjudication of facts is simply the voice of the law declaring the legal effect of the facts adjudicated."

These considerations must control the disposition of the claim made in the case before us, that the conclusions we are asked to review are conclusions of fact and not of law.

It appears that the defendant operated a single track railroad, that train 474 (an extra train) following train 1411 (a regular way freight) ran into the latter train, which had stopped to attach some freight cars standing on a siding, and in the collision one Jerry Nolan, the plaintiff's intestate, was killed. Every special fact from which the trial court inferred the liability of the defendant for the injury is found, includ

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ing the rules and regulations adopted by the defendant for safely operating these trains. The finding shows the neglect of one Hall, the rear brakeman of train 1411, to obey the rules provided for the protection of his train under such circumstances, and that the collision might not have happened if the rules had been obeyed; but also shows that Nolan and Hall were fellow-workmen; and the trial court, therefore, holds that the defendant is not liable for this neglect. The question of liability is not otherwise affected by the relation of master and servant. The complaint does not allege that this relation existed between Nolan and the defendant, and claims nothing by reason of that relation; but charges the defendant with negligently conducting itself in the management of said trains; and the only allegations, so far as is material under the finding, of acts constituting such negligent conduct, are: "by failing to give proper telegraphic information to the conductor and engineer of each of such trains, relative to the position of the other of said trains," and "by failing to exercise proper supervision of the running of said trains," so that train 474 ran into train 1411 and, as a result of the collision, said Nolan, who was rightfully on the former train, was killed. The trial court draws from the special facts found, the following inferences: that the rules and regulations of the defendant "did not sufficiently provide for this emergency (*i. e.*, the operation of the trains in the manner as found), and for the reasonably safe operation of trains 474 and 1411; . . . that the defendant was negligent in not providing for the emergency (*i. e.*, the operation of the trains as found) and for the safe operation of trains 474 and 1411, by special orders and instructions, in addition to the general rules; . . . that the operation of these trains under these general rules alone, under the circumstances of this case (*i. e.*, the special facts as found), was not a suitable and safe method to operate these trains; . . . that the train-despatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains; . . . that the injury to plaintiff's intestate resulted from the combined negligence of rear brakeman Hall and of the defend-

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ant; that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411."

These inferences are reviewable as conclusions of law. It is true that in stating the inferences, the trial judge says, "I find as a fact," etc., but this is immaterial. It is the duty of the trial judge to find, as facts within the peculiar province of a trial court, those inferences which are controlled by the weighing of evidence and the credit given to witnesses; it is also his duty to find his conclusions drawn from these inferences of fact, which in a certain sense are also findings of fact; but they are conclusions reviewable by this court, and the name given them does not alter their intrinsic character of conclusions reviewable for error in law.

We think the court below erred in reaching these conclusions. They are all drawn in support of the claim set up in the complaint, that the defendant violated the legal rights of the plaintiff's intestate, because it failed to exercise proper supervision of the running of said trains, and because it failed to give telegraphic information to the conductor of each train, relative to the position of the other. The supervision of the trains (unless as involved in the failure to give telegraphic information) is to be found in the rules for the movement of the trains. These rules are before us; they are substantially the same as those in use by about ninety per cent of the steam railways of this country, and the trial court finds that "for the general movement and operation of trains these rules are the best and safest general rules yet devised by the best railroad talent of the country." There is nothing in the record that calls for a review of this finding; for the purposes of this case we assume the conclusion to be correct. These rules cover the movement of regular and extra trains; they provide for special orders for starting extra trains; they require the train-despatcher to give telegraphic information of the meeting place of such trains, and of trains moving in the opposite direction, as well as of regular trains off the regular time; but they do not require him to inform by telegraph trains moving in the same direction, of their relative position, and for that purpose to keep in mind

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the position of all such trains so as to decide as they approach each station whether there is a likelihood that a rear train may overtake and, if the rules are not obeyed, run into the forward train. On the contrary they are drawn upon the theory that such telegraphic supervision of trains moving in the same direction, in view of all the conditions involved in operating a single track road, tends rather to lessen than increase the safety secured by the rules adopted relative to the movement of such trains. The soundness of this theory has received judicial sanction. *Enright* v. *Railway Co.*, 93 Mich. 409, 413; *Illinois Central R. Co.* v. *Neer*, 31 Ill. App. 126, 134. In the latter case some self-evident reasons are given. We think in this respect the rules of the defendant do not violate its legal duty, and that their compliance or non-compliance with that duty, under a given state of facts,—notwithstanding many cases hold that such question must be submitted with instructions more or less precise, to a jury, by force of the law defining the province of a jury,—is essentially an inference of law; and when drawn by a trial court, is reviewable by this court. So far, therefore, as the proper supervision of trains 474 and 1411 depended on the adoption of adequate rules for the safe operation of these trains, the only legal inference from the facts found is that the defendant did not fail to exercise proper supervision of the running of these trains.

The failure to give trains 474 and 1411 telegraphic information of their relative positions, is found as a fact, and the conclusions of the trial court are simply an inference from this fact, in connection with other facts found, that the defendant by this means had violated the legal rights of the plaintiff's intestate. In other words, the inference is one of legal liability, and affirms that the law which defines the duties of railroad corporations and the rights of persons lawfully on their trains, imposed upon the defendant the duty of giving such telegraphic information, and gave to the plaintiff's intestate the correlative right to have such information given. The validity of this inference is really determined in the disposal of the claim that the rules of the

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defendant did not fulfill its legal obligation in the supervision of these trains, under the circumstances of the case, *i. e.*, the facts as found. The rules do not require such information to be given; because giving such information in all instances involving like conditions, would tend to danger rather than to safety. A railroad corporation in operating its road as a *quasi* public highway, is engaged in a business dangerous to human life, and is exercising for its private benefit a franchise granted by the State on condition that it transport such members of the public as have lawful occasion to use the highway, with every precaution for their safety that public policy, as fixed by legislation or recognized by adjudication, requires; for these reasons the law imposes upon the corporation a duty to use such precautions; that duty it owes to each person lawfully on its trains, and this independently of any special duty arising from a contract of carriage or employment. *McAdam* v. *Central Ry. & Elec. Co.*, 67 Conn. 445, 447. Each person lawfully on a train has a right to the protection of such precaution, and is entitled to damages for any injury done him in violation of this right. In holding that the rules for the supervision of trains under conditions like those attending the trains in question, fulfilled the legal duty of the defendant, in this respect, and that public policy does not require these rules to prescribe giving telegraphic information in the manner claimed, we necessarily hold that giving such information to these particular trains on the day specified is not a precaution required by public policy and is not a duty imposed upon the defendant by law, and therefore a failure to give such information did not violate any legal right of the plaintiff's intestate.

But the claim is made that the conditions attending trains 474 and 1411 differed essentially from the conditions in general attending trains moving in the same direction, and differed so essentially as to constitute an exceptional case or emergency unprovided for by the general rules, and of a character so peculiar to itself as to throw upon the defendant, or its vice-principal, the train-despatcher, the duty of acting in

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view of all these exceptional circumstances as a man of ordinary prudence should act; that the trial court has found that the train-despatcher did not so act; and that such a finding can never be reviewed by this court. This, in truth, is the real ground of the judgment, and the very gist of the question before us.

We think the conditions attending trains 474 and 1411 did not differ essentially from those in general attending trains moving in the same direction, and did not create an exceptional case or emergency unprovided for by the rules; and that the finding of such emergency by the trial court is an inference from the special facts found, reviewable by this court. The conditions in general attending trains moving in the same direction under the rules, without telegraphic information of their relative position, include: all trains, regular and extra, made up in all ways, even to a single engine; trains off their regular time, way freights being commonly behind time; stopping places for trains which are used only occasionally and not at regular intervals; trains moving at all times of day and night, and in all conditions of weather and atmosphere; trains moving at various rates of relative speed. The special facts found, from which apparently the inference of an exceptional case or emergency is drawn, are the following: train 474 consisted of an engine pushing a snow plow; train 1411 was upwards of an hour behind its schedule time; train 1411 stopped to attach three freight cars at Kent Furnace, which is merely a siding where freight trains stop occasionally and at irregular intervals; the rear train when in motion moved at a faster rate of speed than the forward train; the day was very cold and the snow plow threw snow considerably, rendering it difficult for the lookout stationed on the snow plow to see ahead, but just before the accident the plow was not throwing much snow and the lookout could see. We think the conditions shown by these special facts, considered by themselves or in connection with all the special facts found, are within the conditions in general attending trains moving in the same direction; do not constitute an exceptional case or emergency unprovided for

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by the general rules; and did not throw upon the defendant, or its train-despatcher, the special duty of keeping the conductors of those trains informed by telegraph of their relative position. No other inference can be legally drawn from the facts. A conclusion from conceded facts drawn by a court in the exercise of its legal judgment, and controlled by the assumption that two and two make five, is just as truly an error in law as if it were controlled by the assumption that an ordinary breach of contract calls for exemplary damages. In the present case the error is not of this palpable kind; as a matter of first impression there is room for hesitation and doubt; but upon full consideration it seems to us that the legal inference is clear, and that in reaching its conclusion the court below, unless influenced by the error involved in its inference that the rules adopted were inadequate, has failed to apply to the facts those settled principles of sound reasoning whose recognition and application are termed the soul of the law.

The plaintiff relies mainly upon the recent case of *Sprague* v. *New York & N. E. R. Co.*, 68 Conn. 345. In that case the plaintiff's intestate was a servant of the defendant, and was killed in a collision between his train and the train moving in the opposite direction, caused by the misconduct of the conductor of the opposite train. The complaint charged the defendant with liability on account of its violation of its duty as master in employing the conductor at fault to run this train, knowing him to be incompetent. Any other violation of duty on the part of the defendant was inseparably entangled with this, the real ground of the action. The main question considered was one of law, as to the use of the admissions of a demurrer overruled upon a hearing in damages. Aside from this our decision turned wholly upon the question whether, upon the facts as stated, we could find error in the conclusions of the trial court, that the conductor was incompetent, that the defendant knew or ought to have known that he was incompetent, and with this knowledge placed him in charge of the train where his incompetency caused the injury. Here the inference of legal liability from

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the conclusions of fact as stated, was unquestioned. The finding shows that these conclusions were not inferred from subordinate specific facts found, but depended in part upon the weighing of evidence and credit given to witnesses. This sufficiently appears in the opinion, but more clearly in the record which is not printed in the report. We held that such conclusions were plainly conclusions of fact within the province of the trial court. No question was presented as to a conclusion from specific facts found, where such conclusion is clearly a *non sequitur*. The defendant claimed that the question of its violation of a legal duty by reason of the insufficiency of its railroad management, was a pure question of law. In referring to this claim the opinion holds the question to be irrelevant to the case in hand; and that if the principle claimed is sound, it cannot control emergencies which no system of rules can anticipate and provide for. It is in this connection that the language specially relied on, relative to emergencies, is used. The language must be read in this connection and in view of the circumstances of the case then before us. So read, the language does not establish any principle inconsistent with the views expressed in the present case.

After stating the specific facts found and the conclusions from those facts (which statement is strictly a part of the judgment specially setting forth the facts on which it is founded), the finding states that the defendant claimed, as a matter of law, "that upon the facts in evidence the defendant, having operated its trains under suitable rules and regulations and having properly equipped said trains, had performed its entire duty toward plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it;" and that the court did not pass upon this claim, "except to find as a matter of fact from the evidence submitted, that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions by way of special orders, to those provided in the rules, for the reasonably safe operation of these trains."

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The trial court did not err in refusing to sustain this claim of law, in the terms in which it is phrased; but it did err in inferring from the specific facts found, that it was the legal duty of the defendant to give the telegraphic information mentioned; and for the purposes of review this inference is not a conclusion from the evidence, which, the finding shows, had exhausted itself in producing the conclusions of fact from which the inference was drawn. This error is not raised by the assignment specifying error in the refusal to sustain the claim of law, but is raised by the assignments specifying the reasons why the facts specially set forth do not support the judgment founded upon them. The only function in this respect, of that part of the finding reciting the claim of law made, is to show that the questions as to the legal inferences from the facts found were distinctly raised at the trial and decided adversely to the appellant's claims. The real position of the plaintiff is that the trial court has found the defendant failed to exercise ordinary care under the circumstances of this case; that the legal liability of the defendant consists in negligence; that the failure to exercise such care is negligence; that negligence is a question of fact entirely within the province of a trial court; and therefore the law determining the legal liability of the defendant, was properly found as a fact within the exclusive province of a trial court to determine.

We have already indicated the mistake involved in this position; but it is a mistake so often made and so readily fallen into, through the use of words expressing different ideas without due attention to the particular idea the word as used is intended to express, that we deem it advisable to restate the ground of our decision with special reference to the confusion of ideas that leads to such mistakes.

We are dealing with a practical question of procedure, *i. e.*, upon the process or record before us, what are the alleged errors that this court can review? The answer is briefly and broadly expressed in the saying: "Errors in law can be reviewed; errors in fact cannot." As we have seen, "fact" is a word of many meanings, and the saying is deceptive unless we keep in mind the particular meaning

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attached to the word as here used. We have explained that "fact," as here used, denotes those conclusions reached by the trier directly from sifting testimony, weighing evidence and passing on the credit of witnesses,—conclusions which are not within the jurisdiction of this court, and cannot be reviewed or retried on appeal, whatever the process may be; and that it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it as described,—inferences which always involve to some degree the application of rules and principles of law to adjudicated facts, and which may be reviewed whenever the legal process properly presents an alleged error, and we can see that the inference as to which error is alleged is in truth one of this nature. The word, as here used, may possibly have a little broader meaning in some exceptional cases, but this is immaterial to the purpose in hand.

We have also explained that the word "fact," as here used, must be distinguished from the same word when used to denote those matters within the province of a jury. In the latter sense it often denotes the whole question of legal liability which, by the law of jury trial, must in certain cases be settled by a general verdict; and so far as it may be used in connection with jury trials to denote inferences from evidence, as distinguished from inferences from adjudicated facts, it is of necessity used with an imperfect or uncertain meaning. The trial judge, in instructing a jury upon inferences of law, cannot ordinarily know what the inferences from evidence may be, and in all such cases must give his instructions hypothetically, and is limited in this by the consideration that the law of jury trial forbids his giving instructions upon the law in such manner as in truth to invade the province of the jury in drawing inferences from evidence. Whereas in a trial to the court, the judge first adjudicates all the facts, *i. e.*, inferences drawn from the evidence, and puts upon record these facts. The inference from these facts, of legal liability or of the conclusions essential to legal liability, present to us, in a lawful process for that purpose, the questions of law free from the limitations

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which hamper a trial judge in instructing a jury upon the same questions. And it must be remembered that while there is in theory a distinction of a fundamental nature between the judicial function exercised in ascertaining facts from evidence, and that exercised in applying to conceded facts the rules of law for the purpose of inferring logical conclusions and legal liability, yet the two functions are essential to the one judicial act of passing judgment, and the precise line of distinction has little, if any, practical importance, except when the exercise of judicial power is divided between two branches of one court, as in a trial by jury, or is divided for the purpose of establishing an appellate court with a jurisdiction pertaining to the judicial function exercised in applying to conceded facts the rules of law, as in the correction of errors in law by this court. In such cases the necessary line of division, although based on a natural distinction in the character of judicial power exercised for the different purposes, may become, as in this case, a practical question of procedure.

Again, it must be remembered that the rule defining the erroneous conclusions of a trial court which this court can review, is and must be of universal application. There is not a different rule for each class of actions. Actions in tort as well as actions in contract, actions to recover damages resulting from intentional wrongs as well as to recover damages resulting from wrongs not intentional, are all subject to the same rule; and actions of tort or contract wherein questions of negligence arise, are subject to the same rule. The mistake in question is largely due to overlooking this, in the confusion caused by a failure to distinguish, when the word "negligence" is used, the precise one of its many meanings intended to be expressed through the particular use. Negligence is frequently used to express the cause of action where a party seeks redress for injury from an unintentional wrongful act. In the nomenclature of the common law this is called a cause of action enforceable by the action of trespass on the case; "trespass," as signifying a passing over or beyond our right, *i. e.*, a transgression or wrongful

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act (Bac. Abr. *ad verb.*); "trespass on the case," as signifying a form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated. Negligence, so used, is a comparatively modern term of art, denoting a class of actions grouped under one head for the purpose of study and treatment. It covers the injuries received; the act done, positive or negative; the proximate relation of the act to the injury; the legal rule of liability applicable to the case stated, and the application of that rule. The numerous definitions of "actionable negligence" attempt to state briefly and comprehensively the conditions essential to all of this group of actions. So used, "negligence" has no more relation to the question before us than if the meaning denoted were expressed in the older language of the common law,—those causes of action where the appropriate remedy is an action of trespass on the case to recover damages for an unintentional injury. As related to this meaning and sometimes confused with it, "negligence" is used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. This conception of the moral blame which should make one liable for the consequences of his acts, is the foundation of our law of tort, and, in a wider sense, of our whole system of jurisprudence. In the very early stages of English law this element of moral blame, in cases where the conception seemed too subtle for the times, was overlooked, and the innocent cause of a condition resulting in injury was held liable for damages to the innocent victim. But the true theory that moral blame is an essential element of legal wrong, was soon fully recognized, largely through the potent and unacknowledged influence of the Roman law. "*Dolus* (*i. e.*, *injuria quam quis sciens volensque commisit*) *aut culpa* (*i. e.*, *omnis protervitas, temeritas, inconsiderantia; desidia, negligentia, imperitia, quibus citra dolum, cui nocitum est*)", as used in the Lex Aquilia, and as approximately expressed in our common law by the terms "intention or negligence," describe the two phases of the moral blame or fault essential to make the one causing damage legally liable. 2 Austin's Juris. 109.

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The body of our law has been developed through the application of this conception to an infinite variety of facts or events. It has its origin in the accepted law of ethics, and the unfolding of its meaning as a legal maxim is confided to the court. Indeed, the highest function of a judge is exercised in holding to a steady and definite course in the application of such a maxim to ascertained facts, whether their conjunction be novel or not. In the exercise of such a function our system of jurisprudence develops under the control of fixed maxims and prior authorities. It is this control of the element of discretion, inherent in the application of a general principle to each new state of facts, that distinguishes the justice administered by a common law judge from that of an oriental Cadi. Whether this primary conception of moral blame is vague or not in itself, the principle of legal liability which in theory it justifies, is certain; the legal liability is not wholly coincident with the moral blame, it depends upon the law (however derived); and that law consists mainly in rules of public policy defining and limiting the rights and duties pertaining to person and property. These rules are ordinarily intended to square with the highest theory of ethics; an intention not always realized. But it is the law and not the theory which determines legal liability. No principle of legal liability which is in the legal sense uncertain,—which is derived, not from settled maxims and authority that must govern every case, but from the unrestrained will of a single man or a dozen men which can govern no other case,—is a legal principle. *Ubi jus incertum, ibi jus nullum.* Negligence, with the meaning under discussion, is a convenient form for denoting the conception of legal blame in a certain class of causes of action, for the purpose of investigating the theory underlying the law which determines liability in such cases. It is a term more useful to the jurist in seeking the theoretical sources of the law, than to the judge in applying positive law to conceded facts. Used in this sense, negligence is largely synonymous with the law of liability in this class of actions (although it hardly covers the whole law of liability in such cases), and denotes a prin-

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ciple which is essentially compound, *i. e.*, one which includes a variety of maxims and rules, any or all of which may be involved in its application to particular cases. This use of the word might not have produced the confusion it has led to, were it not that one of the rules covered by the term "negligence," and one most frequently invoked in actions of this character, involves the use of negligence with the primary meaning of the word, and so the considerations peculiar to this single rule have been easily commingled with those applicable when the same word is used, not with its primary meaning, but as a term of art signifying the whole principle of legal liability. Negligence thus used is scarcely distinguishable from heedlessness, and may be shown in omitting to do an act or in doing an act. When the law says a person whose conduct is negligent (in this sense), the other conditions of liability existing, is liable for damages caused by his conduct,—the meaning of "negligent," like the meaning of any material word used in stating a rule of law, is a question of law to be settled by the courts whose province it is to declare the law; and where the rule is intended to apply to an indefinite variety of events, the meaning of the rule in its application to each group of events is a question of law for the court. So it has been held in cases of "reasonable" notice to take a deposition; *Sharp* v. *Lockwood*, 12 Conn. 155, 159; *Sing Cheong Co.* v. *Wing*, 59 id. 535, 543; "reasonable" time for presenting a note for payment; *Lockwood* v. *Crawford*, 18 Conn. 361, 372; "reasonable" or "diligent" search for a lost document; *Kelsey* v. *Hanmer*, 18 Conn. 311, 317; and the principle may be illustrated in other ways. This is elementary law; were it not so, the growth of any stable system of jurisprudence would be far less practicable. No difficulty can arise where the group of events calling for the application is clear and certain. But where, as sometimes happens, the group of events in respect to which the meaning of a word must be declared, are of a nature insusceptible of clear statement, then, while the function of ascertaining facts from testimony and that of applying the law to the facts, should be separately exercised by the trial judge,

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yet any adequate separate statement by him in the record of the results, *i. e.*, the facts as ascertained and the application of the law to those facts, may be impracticable. Dilemmas of a similar nature account for most of the troublesome questions relating to the instruction of a jury by the court. In a trial to the court, where the two functions are united, there is no difficulty so far as the disposition of that case is concerned; but inasmuch as a statement of the facts is impracticable, the application of the law is not apparent, and the case cannot serve as a precedent, and cannot be reviewed for error in law by an appellate court.

In a large number of cases the material question is whether the ascertained conduct of a person is in law negligent, in the sense last indicated. Often the ascertained conduct cannot be formulated into a series of adjudicated facts; it consists of a single impression produced in the mind of the trier by the whole mass of relevant testimony. That impression cannot be stated in words; it is a mental view which language is not luminous enough to photograph. Is that conduct negligent in law? Clearly the conclusion of the trier that it is or is not, must be, *quo ad* the trier, a conclusion of law; whether it be considered as an inference from many facts, or as the declaration of the meaning of a rule of law in relation to a single fact, it is the inference of a legal wrong from ascertained fact, and that is essentially a conclusion of law. Equally clearly the conclusion of the trier must be, *quo ad* the power of this court to review his inference, a conclusion of fact. Not because the inference is not one of law, but because the fact or facts from which the inference is drawn cannot by any process known to the law be transferred from the mind of the trier to the mind of the appellate court. When such a question comes before us we say we will not attempt to review the conclusion; it is one of fact; and this, notwithstanding the trial judge has conscientiously tried to give in his finding a word picture of a mental impression that cannot be painted in words. He has not succeeded; he cannot succeed; the precise legal inference he has drawn must remain unknown; it cannot, there-

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fore, be reviewed, and is practically a conclusion of fact. Now this condition may arise in any kind of action, and is not peculiar to actions of negligence, using the word as a term of art describing a certain class of actions.

The mistake of the plaintiff arises, mainly, from confusing an ascertained fact—where the fact is conduct claimed in law to be negligent,—incapable of transference from the mind of a trial court to that of an appellate court, with the legal inference drawn by the trial court from that fact, and which cannot be reviewed because the appellate court cannot have the fact from which the inference is drawn, before it, and then applying the practical result of such a condition to the inference of liability in all actions classed under the term actions of negligence. And this confusion arises mainly from the fact that the word negligence, as used in respect to the same general subject, has entirely distinct, although closely related, meanings, dependent on the particular purpose for which it is used. A similar confusion arises from the use of "ordinary care," which is used sometimes in reference to actual conduct under circumstances, as found by the trier, incapable of being so formulated in a finding as to state the facts really adjudicated, and show the inference actually drawn, and sometimes as indicating the rule of legal liability under any given state of facts; as used in the latter sense it may denote the ultimate ground of every cause of action.

In the present case we hold that the inference of legal liability drawn by the trial judge, is reviewable, because the events upon which the cause of action arises are of such a nature that they can all be fully and clearly found by a trial court as adjudicated facts, and have been so found and properly appear before us in the record; that the conclusion of the trial court of an "emergency," which required of the defendant a line of conduct appropriate only to the single transaction in question, is reviewable, because this subordinate conclusion is drawn from adjudicated facts fully and clearly found in compliance with existing law of procedure, and the trial court in reaching the conclusion—unless the law defining such an emergency was misapplied—has plainly

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mistaken those rules of sound reasoning whose observance is essential to the validity of an inference from admitted facts.

In stating our conclusion we have not sought to lay down a binding rule, but have merely endeavored to explain, as far as the infirmities of language will permit, the test of our decision in this case. We believe that such a test if applied, with discrimination as to the circumstances of each case, to the whole line of our decisions where the question of reviewability of errors alleged in inferences of trial courts has arisen, will reconcile those cases as resting on a ground substantially the same in all. This question was very carefully considered in *Farrell* v. *Waterbury Horse R. Co.*, 60 Conn. 239. The opinion of JUDGE TORRANCE in that case touches *cum acu* the root of the difficulty; and has been our main guide in subsequent decisions. The underlying principle was there considered with special reference to contributory negligence, where the ascertained fact could not be stated in the finding, and so the inference of the trial court could not be reviewed, and remained for all practical purposes a conclusion of fact. In this case we consider the same principle with special reference to the question of legal liability, where the adjudicated facts can be and are fully set forth. And the task of testing the principle is now of a somewhat different nature and easier than it was then, by reason of further changes in procedure and our decisions upon the effect of such changes, in enlarging the facilities for the full exercise of our jurisdiction in correcting the erroneous inferences of a trial court.

We allude to some matters suggested by the record merely to avoid any implication from a failure to mention them. It is claimed that one or two of the facts stated, as found from the evidence, are in reality nothing but deductions from the rules or from other facts found, and as such erroneous. The facts referred to have too slight a relation to the controlling question to call for particular comment. As a whole the finding is exceptionally full and clear; and furnishes proper facility for its correction in the matters complained of, were such correction necessary.

It is claimed that the court erred in its conclusion that the

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injury resulted from the combined negligence of the brakeman Hall and the defendant. The Massachusetts case of *Hayes* v. *Western R. Corp.*, 3 Cush. 270, apparently supports this claim. As we hold that the court erred in finding the defendant negligent, otherwise than by reason of the fault of its brakeman, the question is not material and we do not pass upon it.

The court finds that "the employees of the defendant occasionally violated this rule (the one whose violation by the brakeman caused the collision) and the conductor in charge of 1411 knew this." If there were other facts in connection with this, clearly showing that the rule was not enforced through the neglect of the defendant, a different question would arise in respect to its liability. The duty imposed by law upon the defendant is not fulfilled by merely adopting adequate rules. The law imposes upon it a duty in respect to the enforcement of rules necessary for the protection of the public. This question was considered in *Gerrish* v. *New Haven Ice Co.*, 63 Conn. 9, 16, and is discussed in *Railway Co.* v. *Hammond*, 58 Ark. 324, 332. It is not raised in this case.

The judgment under review is controlled by the conclusion that the collision in which Nolan was killed, was caused by the legal negligence of the brakeman Hall in conducting the business of the defendant; and that the defendant escapes liability solely on the ground that Nolan, the victim of the wrong, as well as Hall, through whom the injury was done, was its employee. The rule which produces such a result is too firmly established as law by a multitude of decisions to be now reversed or seriously modified by any exercise of the power vested in courts.

There is error; the judgment of the Superior Court is set aside and the case remanded for assessment of nominal damages.

In this opinion the other judges concurred.

NOTE:—The rule (of co-employee) is one deduced by a process of analogy from decisions rendered under a state of society very different from that of to-day; and the crystallization of such analogies into a

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binding rule is of comparatively modern origin. It first appeared in England in *Priestley* v. *Fowler*, 3 Mee. & Wels. 1; and in 1850 was applied to the employees of railroad companies, in *Hutchinson* v. *York N. & B. Ry. Co.*, 5 Exch. 343. In 1841 it was formulated in South Carolina; *Murray* v. *Railroad Company*, 1 McMullan, 335; and in 1842 in Massachusetts, in the leading case of *Farwell* v. *Boston & W. R. Corp.*, 4 Metc. 49. The very able opinion of CHIEF JUSTICE SHAW in the last case, has largely dominated the law on this subject during the past fifty years, and contains the most plausible statement that can be given of the grounds supporting the public policy which compels a workman entering the service of a master to assume the whole risk of any injury that may be done him by the master through the misconduct of a fellow-servant. The vigorous language of this statement, however appropriate it may have been at that time, has a touch of grim irony when read in the light of existing conditions in the employment of labor. In England, in 1880, the rule was changed by the "Employers' Liability Act," and is now practically abolished as to large classes of workmen, by the "Workmen's Compensation Act" passed during the present (1897) year. The rule has been dealt with by legislation in several of our sister States. It was first formally recognized in this State in *Burke* v. *Norwich & W. R. Co.*, 34 Conn. 474, 479, with a strong protest against the sufficiency of the grounds for a principle deemed too firmly settled in other jurisdictions to be differently treated here. In *Darrigan* v. *New York & N. E. R. Co.*, 52 Conn. 285, the application of the rule was somewhat modified, and possibly cases may arise where the legitimate exercise of the duty of the court in applying established principles to novel conditions, may involve some limitations of its apparent reach. But the evil is too deep seated to be remedied by judicial action; it needs radical treatment through wise legislation.

W. H.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

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Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The question whether the language of a will works an equitable conversion of real estate into personalty, is one to be determined by the courts of the testator's domicil, in so far as the land in that State is concerned.

But such determination is not obligatory as a rule of decision, upon the courts of other States, in a controversy between different parties, in respect to the title or succession to lands there situate, either

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under the principles of general jurisprudence or the Constitution and laws of the United States.

The identity of parties necessary to support an estoppel by judgment does not exist if the suitors do not occupy the same individual or representative capacity in each suit.

Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it.

The provisions of the will of a South Carolina testatrix reviewed, and *held* not to work an equitable conversion of her Connecticut real estate into personalty.

The rules of international comity do not require the courts of this State to accept the interpretation placed upon a will by the courts of the testator's domicil, where such interpretation directly involves the mode of passing title to lands in this State.

It is a general rule that what a court cannot enforce it cannot decree.

[Argued November 2d, 1897—decided January 5th, 1898.]

APPEAL from an order and decree of the Court of Probate for the district of Bridgeport, ascertaining the heir and distributee of the intestate estate of Julia Clarke, late of Columbia, South Carolina, deceased; taken to the Superior Court in Fairfield County and reserved by that court, *Elmer, J.*, upon a finding of facts, for the consideration and advice of this court. *Judgment affirming probate decree advised.*

The finding stated the following facts: Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicil of marriage. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage. On February 10th, 1894, the wife, Julia H. Clarke, died. On May 20th, 1894, the daughter, Julia Clarke, died, leaving no creditors. At all times since said marriage the State of South Carolina has been the domicil of the appellant and his family.

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During coverture and at the days of the dates thereof, Julia H. Clarke executed the following will and codicil:

WILL.

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

"First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

"Second. I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely invested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York, in quarterly payments, during the term of his natural life.

"Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars, ($10,000).

"Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand dollars, ($5,000).

"Fifth. The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One half thereof to my husband, Henry P. Clarke, and one half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

"In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest,

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residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

"I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

"In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891.

"JULIA H. CLARKE. (Seal)"

CODICIL.

"I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the twenty-fifth day of May, A. D., 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same:

"First. I hereby ratify and confirm my said will in every respect, save as far as any part of it is inconsistent with this codicil.

"Second. I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

"Third. I further will and direct that after the death of Mrs. Laura Sherwood, that the portion of my estate which shall at that time be invested for her benefit under the

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second item of this codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death, then the investment directed for her benefit under item two of this codicil shall be and is hereby disposed of as directed in item five of my said will.

"Fourth. I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit, as directed in item two of said will, shall then become a portion of my estate, and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death, then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

"In witness whereof I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D., 1893.

"JULIA H. CLARKE, (L. S.)"

Said will and codicil were duly established in the Court of Probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the Court of Probate for the district of Bridgeport, pursuant to the provisions of § 550 of the General Statutes.

The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease, except such as had or should come to her under her mother's will. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease, consisted of $825.25 in personalty, the home plantation in South Carolina, valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000. This last mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7th, 1891, leaving a will under which she took a legacy of $100,000 (paid

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before said partial distribution), and one sixth of the residue of his estate. She owed debts amounting to $30,000 at the time of her decease.

The estate of the daughter, Julia Clarke, referred to in the petition to the Court of Probate, consisted of an undivided one third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars. Both real estate and personal property of large value remained in the said Barnum residue, at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

Henry P. Clarke (the appellant herein), "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will," brought suit against Nancy B. Clarke (the appellee herein) in the Circuit Court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises, and for such further relief as may be just and proper." A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by the report thereof in 46 S. Car. 230, which was made by ref-

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erence a part of the record in this cause; and said decision was considered by the Court of Probate for the district of Bridgeport.

By the law of the State of South Carolina, the court to which the action was brought had jurisdiction both of the persons and of the subject-matter of that suit; and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

Prior to May 29th, 1897, letters of administration had been granted by the Court of Probate for the district of Bridgeport to Henry P. Clarke, as administrator of the estate of Julia Clarke, late of Columbia, South Carolina, but leaving real estate in said district, deceased intestate; and he had duly qualified as such. On May 29th, 1897, he as such administrator made written application to said Court of Probate, stating that divers persons claimed to be entitled to have said real estate set out and distributed to them, and praying that the court might hear their claims and ascertain to whom the estate should be set out and distributed. Actual notice of this petition and of the time set for the hearing thereon was given to Nancy B. Clarke, and John H. Perry, Esq., was appointed by the Court of Probate as her guardian *ad litem*. After a full hearing, a decree was passed on July 3d, the material part of which is as follows: "Upon such hearing, this court finds that the intestate was domiciled in the State of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this State consist of an undivided interest in certain real estate, situated in the town of Bridgeport, of the value of about $, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate, domiciled in the State of South Carolina, an exemplified copy of whose will 'and the decision of the Supreme Court of South Carolina inter-

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preting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant,' is on file and of record in this court and hereby referred to, and whose estate is as yet unsettled and undistributed. Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke."

From this decree Henry P. Clarke appealed to the Superior Court, stating that he was a citizen of South Carolina, and the father and only surviving parent of said Julia Clarke, deceased, and an heir at law and distributee of her estate, and therefore aggrieved by the decree. By order of the Court of Probate notice of the appeal was duly given to Henry P. Clarke, administrator on said estate, and to John H. Perry, guardian *ad litem* of Nancy B. Clarke, and also, by personal service of a copy of the process, to Nancy B. Clarke, at the place where she was temporarily residing, to wit, at Asheville, North Carolina. On the return of the appeal to the Superior Court, Mr. Perry was also there appointed her guardian *ad litem*, and "authorized and directed to appear and defend said action in her behalf."

The reasons of appeal were as follows:—

I.

1. The estate of the intestate in the State of Connecticut consisted of property all of which is for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina, and her estate has ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

3. By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate.

II.

The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court con-

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sisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application.

Paragraphs 2 and 3 of the first reason assigned were admitted by the reply, and the residue of the reasons assigned were denied.

LeRoy F. Youmans of South Carolina, with whom was *John S. Verner*, also of said State, and *Goodwin Stoddard*, for the appellant.

First. The interpretation of the will in question by the highest court of the domicil of the testatrix, is binding upon the courts of this state. The rule that the *lex rei sitæ* governs the disposition by will of real estate, applies *only* to the capacity of the testator and the formalities of execution. A will is a conveyance, but in this case no dispute exists as to the validity of the instrument or its due execution. The ascertainment of the intention of a testator as expressed by the words he selects, is an entirely different matter, and is the peculiar function of the courts of the domicil. Sto. Confl. of Laws, §§ 474, 479 *b.*; 1 Jar. on Wills, pp. 1–3 and notes. The fact that the actual execution of the will took place outside the State of South Carolina, does not alter the case. The domicil of Mrs. Clarke after her marriage was continuously in South Carolina. *Depuy* v. *Wurtz*, 53 N. Y. 556; *Caulfield* v. *Sullivan*, 85 id. 153; *Harrison* v. *Nixon*, 9 Pet. 483, 504, 505. The rule that a will is to be interpreted according to the law of the testator's domicil, *is not limited to dispositions of his personal estate, but seems to apply in all cases, except where it appears that he expressed his meaning with reference to the law of some other place.* Sto. Confl. of Laws, 651; *Trotter* v. *Trotter*, 4 Bli., N. S. 502, 3 Wils. & S. 407; *Wallis* v. *Brightwell*, 2 P. W. 88; *Max-*

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well v. *Maxwell*, L. R. 4 H. L. 506; *Caulfield* v. *Sullivan*, *Harrison* v. *Nixon*, *supra*. *Ford* v. *Ford*, 80 Mich. 42 (1890), is exactly in point and fully supports the appellant's contention. See also *Leavens* v. *Butler*, 8 Port. (Ala.) 394; *Crusoe* v. *Butler*, 36 Miss. 150; *Guerard* v. *Guerard*, 73 Ga. 506; *Washburn* v. *Van Steenwyk*, 32 Minn. 336; *Danelli* v. *Danelli*, 4 Bush (Ky.), 51; *Wilkins* v. *Allen*, 18 How. 385; *Armstrong* v. *Lear*, 8 Pet. 52; *Parsons* v. *Lyman*, 20 N. Y. 103; *Cross* v. *Trust Co.*, 131 id. 330; *Dammert* v. *Osborn*, 140 id. 30; *Chamberlain* v. *Napier*, L. R. 15 Ch. Div. 630; 2 Greenl. Ev. § 671. The matter of construction of this will is *res judicata*. The Supreme Court of South Carolina had jurisdiction of the parties, and of the subject-matter, which was the interpretation of the instrument. The controversy was between the same parties and over the same matter. A party to that suit cannot now claim that a different construction be put upon the will. *Washburn* v. *Steenwyk*, *supra*. Courts of equity habitually, when they have jurisdiction of the parties, decree the conveyance of lands in another State or country; *Penn* v. *Lord Baltimore*, 1 Ves. 443; *Newton* v. *Bronson*, 13 N. Y. 587; *Wood* v. *Warren*, 15 N. J. Eq. 81; and our own court expressly notes the difference between direct interference with lands in this State, and such an indirect effect upon them, in *Farmers' L. & T. Co.* v. *Postal Tel. Co.*, 55 Conn. 334.

Second. But upon the merits of the case the decision of the South Carolina court was correct. The will worked an equitable conversion of the realty. 1 Smith & Tudor, Lead. Eq. Cas. 1118, 1120; 1 Pom. Eq. Juris. 371; 2 Jar. on Wills, 170; Bisph. Eq. § 307; *Hammond* v. *Putnam*, 110 Mass. 232, 236; *Greenland* v. *Waddell*, 116 N. Y. 234, 240; *Perry* v. *Logan*, 5 Rich. Eq. (S. Car.) 202; *Craig* v. *Leslie*, 3 Wheat. 563. The question is simply and solely one of *intention*. Bishp. Eq. § 312; *King* v. *King*, 13 R. I. 501; 3 Pom. Eq. Juris. 1160; *Wurts* v. *Page*, 19 N. J. Eq. 365. This intention to change real property into personal, may be shown by necessary implication, as well as by positive direction to sell. *Hunt's and Lehman's Appeal*, 105 Pa. St.

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128; 3 Pom. Eq. Juris. § 1160; 2 Beach, Eq. Juris. § 523; 2 Woerner on Law of Adm. 726; *King* v. *King*, *supra*; *Given* v. *Hilton*, 95 U. S. 592. The words "sum" and "paid over" are applicable *only* to money, and show clearly the intention of the deceased. They are especially strong when taken with the context. Moreover, the words used have received a judicial interpretation. *Leake* v. *Watson*, 60 Conn. 498, 508; *Delafield* v. *Barlow*, 107 N. Y. 535, 539; *Going* v. *Emery*, 16 Pick. 116; *Dodge* v. *Williams*, 46 Wis. 70, 96; *Wurts* v. *Page*, *supra*; *Green* v. *Johnson*, 4 Bush (Ky.), 164. It was clearly Mrs. Clarke's intention and purpose that her husband and daughter Nancy should share equally in her estate. She knew that most of her estate then consisted of realty in the States of Connecticut, New York and Kansas, and that by the law of this State, upon the death of her child intestate, the share would go in its entirety to a surviving brother or sister; but that by the law of her domicil it would be divided equally between the surviving child or children and her husband; hence the provision in her will for equitable conversion. No importance attaches to the fact that no conversion had actually been made before the child's death. 2 Woerner's Amer. Law of Adm. p. 726; 1 Wms. Exrs. 802, note; *Wurts* v. *Page*, *supra*; *Smith* v. *McCreary*, 3 Ired. Eq. 204; *Eby's Appeal*, 84 Pa. St. 241; *Fisher* v. *Banta*, 66 N. Y. 468, 476; *Lent* v. *Howard*, 89 id. 169, 176.

John H. Perry, with whom was *Winthrop H. Perry*, for the appellee.

First. The claim of equitable conversion has no substantial foundation in the language of the will. There is no direction to sell or convert, or to do either, imperatively or otherwise; and we find no rules or precedent, aside from this South Carolina decision itself, which would warrant an imperative implication from the language used. 3 Red. on Wills, 140; Wig. on Wills, 156; 2 Sto. Eq. § 1214; 3 Pom. Eq. Juris. §§ 1159, 1160; Beach, Eq. § 523; 3 Jar. on Wills, 176, 589; *Hammond* v. *Putnam*, 110 Mass. 232;

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King v. *King*, 13 R. I. 501; *White* v. *Howard*, 46 N. Y. 144; *Hobson* v. *Hale*, 95 id. 588; *Hale* v. *Hale*, 125 Ill. 399; *Moore* v. *Robbins*, 53 N. J. Eq. 137; *Hunt's and Lehman's Appeal*, 105 Pa. St. 108; *Lynn* v. *Gephart*, 27 Md. 547; *Orrick* v. *Bœhm*, 49 id. 72; *Carr* v. *Branch*, 85 Va. 597; *Mills* v. *Harris*, 104 U. S. 626; *Allen* v. *Watts*, 98 Ala. 384; *Ford* v. *Ford*, 70 Wis. 19; *Ford* v. *Ford*, 80 Mich. 45; *Neus* v. *Davidson*, 49 Minn. 469; *Eueberg* v. *Carter*, 98 Mo. 647; *Wheeless* v. *Wheeless*, 92 Tenn. 294; *James* v. *Throckmorton*, 57 Cal. 368.

Second. But the appellant says, that whether the South Carolina decision be right or wrong, it *proprio vigore*, makes Connecticut land South Carolina money, and leaves to this court the simple privilege of concurrence; that the question is *res adjudicata*. This claim is erroneous. Real estate must be conveyed according to the laws of the State in which it is situated. *Farrel Foundry* v. *Dart*, 26 Conn. 376; *Irwin's Appeal*, 33 id. 128; *Chappel* v. *Jardine*, 51 id. 64; *Farmers' L. & T. Co.* v. *Postal Tel. Co.*, 55 id. 334; 1 Redf. on Wills, 398; 1 Jar. Wills, 1; Whart. Confl. of Laws, §§ 273, 274, 278; *U. S.* v. *Fox*, 94 U. S. 315; *U. S.* v. *Crosby*, 9 Cranch, 115; *Kew* v. *Moon*, 9 Wheat. 565; *McCormick* v. *Sullivant*, 10 id. 192; *Suydam* v. *Williamson*, 24 How. 427; *Arnot* v. *Griggs*, 134 U. S. 316; *Hawley* v. *James*, 7 Paige Ch. 213; *Hosford* v. *Nichols*, 1 id. 220; *Nelson* v. *Potter*, 58 N. J. L. 324; *Brook* v. *Frank*, 51 Ala. 85; *Jennings* v. *Jennings*, 21 Ohio St. 56; *Abrams* v. *Moseley*, 7 S. Car. 150. It is for this court to determine whether, under Connecticut law, Mrs. Clarke intended and has sufficiently directed an imperative out and out sale and conversion of land in this State. *White* v. *Howard*, 46 N. Y. 144; *White* v. *Howard*, 38 Conn. 342. See also the following cases, the first three of which concerned the same will and estate: *Penfield* v. *Tower*, 1 N. Dak. 216; *Lee* v. *Tower*, 124 N. Y. 370; *In re Tower's Estate*, 49 Minn. 371; *Applegate* v. *Smith*, 31 Mo. 166; *Williams* v. *Nichols*, 47 Ark. 254. The cases of *Hale* v. *Hale*, 137 Mass. 168, *Hobson* v. *Hale*, 95 N. Y. 588, and *Hale* v. *Hale*, 125 Ill. 399, concerned the same will and estate. The

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cases of *Wurts* v. *Page*, 19 N. J. Eq. 365, *Page's Estate*, 75 Pa. St. 87, construed the same will and affected the same estate. The cases of *Osburn's Appeal*, 104 Pa. St. 637, *McCartney* v. *Osburn*, 118 Ill. 403, 121 id. 404, and *Warner's Estate*, 130 Pa. St. 365, concerned the same will and estate. In all these cases there was no suggestion that an earlier decision in one State could affect the title to land in another; but all agreed that such questions were to be adjudicated by the court of the State in which the land was located.

The appellant relies upon the conclusiveness of the South Carolina decision, on two grounds, *viz: res judicata, and lex domicilii.* In relation to *res judicata*, the rule undoubtedly is that the former adjudication must have been: (1) between the same parties; (2) upon the same question; (3) which question the court had power and jurisdiction to determine. The parties in the two cases are not the same; the question is not the same; and the South Carolina court had no power or jurisdiction to determine the question submitted to it so as to affect *Connecticut lands*, and therefore the third essential of an effective *res judicata* fails. *Cooper* v. *Reynolds*, 10 Wall. 316; *Carpenter* v. *Strange*, 141 U. S. 103; *Farmers' L. & T. Co.* v. *Postal Tel. Co.*, 55 Conn. 334; *McCartney* v. *Osburn*, 118 Ill. 403, 121 id. 408; *Nelson* v. *Potter*, 50 N. J. L. 324; *Thompson* v. *Whitman*, 18 Wall. 487. In relation to the appellant's claims as to the conclusiveness of the *lex domicilii*, it can only be said that if the court of South Carolina is given the most liberal construction accorded in any of the authorities cited by him, it may *interpret* in a limited and qualified sense; it cannot import such a *construction* as is claimed here. And. Law Dict. 240, 564; *Proprietors, etc.*, v. *Jones*, 36 N. J. L. 206, 209; *Atkinson* v. *Staigg*, 13 R. I. 725; *Lee Bros., etc.*, v. *Cram*, 63 Conn. 433, 438.

BALDWIN, J. Julia Clarke of South Carolina died there in infancy, and at the time of her decease was the owner of real estate in Connecticut. Her interest in it was derived from the will of her mother, Julia H. Clarke, who was also

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a citizen of South Carolina. This will was admitted to probate in the proper court of that State, and a suit for its construction afterwards brought there, before a court of equity having jurisdiction of the parties and the subject-matter, which resulted in a decree to the effect that it worked an equitable conversion of all the real estate of the testatrix, wherever situated.

If this be the true construction of the will, the decree of the Court of Probate for the district of Bridgeport, from which the present appeal is taken, was erroneous.

The appellant contends that, upon this point, the South Carolina decree is conclusive, both on the ground that the matter thus became *res adjudicata*, and because to hold otherwise would be to deny full faith and credit to the judgments of a sister State.

The only parties to that proceeding were Henry P. Clarke as executor of the will of Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, his infant daughter, under the will, as plaintiff, and Nancy B. Clarke as defendant.

The parties to the present proceeding are Henry P. Clarke as the sole appellant, and as appellees Henry P. Clarke as administrator of the estate of Julia Clarke, deceased, by virtue of letters granted by the Court of Probate for the district of Bridgeport, Nancy B. Clarke, and John H. Perry, Esq., her guardian *ad litem* by appointment of that court.

It is obvious that the parties thus before us are not the same as the parties to the South Carolina action. There Henry P. Clarke did not appear in his own right, and no one was brought in as a representative of the estate of his deceased daughter, Julia. Here Henry P. Clarke does appear in his own right, and is also present as the proper representative of that estate, but has not been brought in as the executor of his wife's will, or as a trustee under it for his daughter Nancy.

If the South Carolina decree had been that the terms of the will did not work a conversion, Henry P. Clarke, in his own right, would have been free to contest that decision in other proceedings, and so would the administrator of the

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estate of his daughter Julia. One who occupies a representative position is, in that capacity, a person totally distinct, in the view of the law, from himself individually. In an action by an administrator, the plaintiff's admissions, made before the grant of administration, cannot be received. *Rockwell* v. *Taylor*, 41 Conn. 55. Had Mr. Clarke, before bringing his action in South Carolina, taken out administration there on his daughter's estate, and then made himself in that capacity one of the defendants, it is doubtful whether the judgment would have bound him, as administrator of her estate in Connecticut, when afterwards entrusted with that position, under the laws of another sovereignty, by the Court of Probate for the district of Bridgeport. Story on the Conflict of Laws, § 522. Had a different person been appointed administrator, in each State, it is certain that there would have been no privity between them. *Stacy* v. *Thrasher*, 6 How. 44. Estoppels must be mutual. Nancy B. Clarke cannot be bound by the South Carolina decree unless Henry P. Clarke was bound by it; and Henry P. Clarke was bound by it only as executor and trustee under her mother's will. Nor can Henry P. Clarke, as a Connecticut administrator, be bound by that decree, as a rule for distributing an estate which, during the whole course of the suit in which the decree was rendered, had no representative to protect its interests before the court.

A comparison of the South Carolina record with that in the case at bar shows, also, that the subject-matter of these actions is not the same.

The South Carolina court was called upon to construe the will of a citizen of South Carolina, disposing of lands in that and other States. It had jurisdiction to make a final and conclusive disposition of the questions presented so far only as it had power to compel obedience to its decree, or as its judgment derived an additional force from the Constitution and laws of the United States.

Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree. So far as concerns the extra-territorial

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effect of foreign judgments, this rule is a principle of international law, subject only to such exceptions as may be founded on the consent of parties, or the exercise of judicial comity in the rare cases where no one country can accomplish the ends of justice by its own unaided authority. Dicey on Confl. of Laws, 38–42.

The courts of South Carolina could settle the construction of Mrs. Clarke's will, so far as related to the real estate in that State, and to the whole of her personal estate. But this personal estate is that only which she owned at the time of her decease, together with any for which the executor might become accountable, by a lawful conversion of realty into personalty. They could not reach out into other States and issue process to authorize the seizure there of lands to which she had a title. They could only exercise a restraining force upon the parties who were before the court, and only upon them in their relations to each other. *Carpenter* v. *Strange*, 141 U. S. 87, 105.

Bearing these principles in mind, it is not difficult to ascertain the subject-matter presented to their consideration, and disposed of by the judgment which they rendered. It was a definition of what by the laws of South Carolina was the power, duty and estate of the executor and trustee under the will, as between him and Nancy B. Clarke. It was this and nothing more, because the plaintiff could submit to them nothing more.

Whether he had any power, duty, or estate, with respect to lands situated in another State, depended upon the laws of that State. Succession to the real estate of a deceased person is regulated at the will of the sovereign within whose territory it is embraced. It has always been regarded as a matter of grave political consequence. *Birtwhistle* v. *Vardill*, 7 Cl. & Fin. 895. Ownership of land controls its occupancy, and largely influences the character of the population. It determines the source to which governments ordinarily look for their surest if not their principal means of financial support. It had, in former times, in England and in all her American colonies, an intimate relation to the

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right of suffrage, and in this State is still a qualification for it under at least one of our municipal charters. 9 Special Laws, 431.

The laws of Connecticut must decide how the lands of Connecticut may be conveyed and inherited, and they make particular provisions, in case of intestacy, for the preservation of ancestral real estate in the line of family descent. General Statutes, § 632. Upon the death of a landowner, whether a citizen of the State or not, whoever takes title by succession takes it because these laws concede it to him, not as a right but as a privilege. It is on this basis that succession taxes are upheld. They constitute part of the terms upon which the grant of the State is conditioned. *Mager* v. *Grima*, 8 How. 490. A devisee takes by an artificial perpetuation of a testator's will, which survives him for that purpose with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed, and limited. Title to land can be conveyed under a testamentary power, only when such a conveyance is sufficient under the laws of the territorial sovereign.

The personal representative of Mrs. Clarke rightfully sought the direction of the courts of her domicil as to the effect of her will upon the estate for which he was or might become accountable before them. As to that matter, the courts of Connecticut could not instruct him. *Russell* v. *Hooker*, 67 Conn. 24. This was the subject-matter of the South Carolina action, and the decree rendered is conclusive upon those who were parties to it. On the other hand, the subject-matter of the case before us is the ascertainment of those who by the laws of Connecticut are entitled to succeed to certain Connecticut lands which form part of an intestate estate in course of settlement before a Connecticut court of probate. As to this the courts of South Carolina could give no instructions, and were asked for none. The whole decree must be taken together, in determining its true scope and meaning. The adjudication that the will worked an equitable conversion of all the real estate of the testatrix, wheresoever situated, is immediately followed by

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the adjudication "that the plaintiff, as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." It is not to be presumed that the court intended to go beyond its jurisdiction. In directing the plaintiff, as executor, to receive, administer and account for all his wife's real estate as personalty, his duty as to the real estate in South Carolina, and as to the proceeds of any sales that might be made, under the terms of her will, of real estate situated out of the State, was plainly laid down. These were the instructions which he needed for his protection, and if, in fact, he hereafter receives, under the letters testamentary issued to him by the Probate Court of South Carolina any moneys to be accounted for before that court from sales of real estate in other States, they will regulate his disposition of them. The decree relates solely to his powers and functions as an executor, and does not speak of those belonging to him as a trustee. The conversion was to be accomplished before any transfers were made to constitute the trust estate. The only subject of adjudication was the proper mode of administering upon the estate of Mrs. Clarke, so far as it was or should be in course of settlement before the courts of probate of her own State. Those courts could only deal with the property that had come or might come under their control. *McCartney* v. *Osburn*, 118 Ill. 403.

The South Carolina decree, therefore, did not estop Nancy B. Clarke from urging in this action in support of her claims as heir of Julia Clarke under the Connecticut statute of distributions, that the real estate to be distributed was held by her sister, as real estate, under their mother's will. Those questions had never before been litigated between her and Henry P. Clarke.

It is unnecessary to inquire whether, if he had been a party individually to the South Carolina suit, and the principal administrator of the estate of Julia Clarke had also been brought in, the court would have had jurisdiction to

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make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them. Under the conditions which in fact existed, its determination did not constitute a binding rule of decision for the Court of Probate for the district of Bridgeport in the present proceeding, either under the principles of general jurisprudence or the Constitution and laws of the United States. *Aspden* v. *Nixon*, 4 How. 467, 497.

The decree of that court, from which this appeal is taken, treated the real estate in this State left by Julia Clarke as being real estate to all intents and purposes. If, in truth, it had become before her death the subject of an equitable conversion, this decree must be reversed; and the reasons of appeal have brought this point directly before the Superior Court for decision.

Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it.

The will and codicil of Mrs. Clarke directed her executors to pay her debts; to invest a portion of her estate sufficient to produce an annuity of $1,000, to be paid to her father during his life; to make a similar investment of enough to yield an annuity of $500 to be paid to another; and to pay a certain legacy of $5,000. As to the residue of her estate, real and personal, wherever situated, she provided that it should "be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust." The husband was made the devisee and legatee of the children's shares in trust for each until the child should become twenty-five years of age, upon which event he was "to pay the whole sum over to" such child, and should the latter previously marry with his approval, or in case of his death, with that of a proper guardian, half of the

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"share" of such child was to "be paid" to him upon his marriage, and "the other half" when he became twenty-five. These provisions were followed by a devise and bequest of the residuary estate "as aforesaid, to each and to their heirs and each of them forever."

The personal estate in possession of the testatrix at the the time of her decease, was inventoried at only $825, but she was also entitled to a residuary interest worth over one hundred thousand dollars, in a large estate consisting of both realty and personalty, in course of settlement in this State. It was, therefore, uncertain whether it would be necessary to sell any of her real estate to meet debts and legacies, and we concur with the Supreme Court of South Carolina in the opinion that there was nothing in the will to work the out and out conversion for which the appellant contends, unless that be the result of the dispositions of the residuary clause. *Clarke* v. *Clarke*, 46 S. Car. 230, 243.

It was the view of that court that this result did follow from the commingling of the entire residuary estate, both real and personal, in one common mass, and the directions to divide it into equal parts, one to belong to the husband, and one to him in trust for each child, and that he "pay over the whole sum" of each daughter's share to her when she becomes twenty-five, or in case of her marrying sooner, with the consent of her father or guardian, that "one half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five." We have considered the grounds for this conclusion set forth in the learned opinion MR. JUSTICE POPE, with the care demanded by our respect for the distinguished tribunal for which he speaks, and find ourselves unable to yield assent to the train of reasoning, so far as it may apply to the effect of the will upon the real estate in Connecticut.

In every case in which a testator, owning both real and personal estate, after making particular provisions for debts and legacies, disposes of all the residue of his estate in favor of one or more persons, this residue may be said to be thus commingled or blended in one common mass. He gives it

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as an entirety; and, unless he otherwise directs, it is given in the precise condition in which it exists, whether real or personal. Mrs. Clarke used apt terms to convey real estate. The phrase "I give, devise and bequeath," is used in the beginning of the residuary clause, and repeated at its close with the addition of words of limitation descriptive of a fee-simple estate in lands, and unnecessary for any other purpose. The direction for an equal division between her husband and children is naturally applicable to a division of the property left, rather than of its proceeds. The only provisions, indeed, which are particularly relied on in support of the appellant's claims are those as to paying over the whole sum belonging to each child's share, upon her attaining the age of twenty-five, and, in the event of her marriage under certain conditions, half of her share at an earlier period.

It is unquestionable that these terms are appropriate only to a payment of money, but they must be read in connection with the rest of the will. No payment was directed until the beneficiary married or attained the age of twenty-five, and it was then to be made by the trustee, not by the executor. If a conversion of realty into personalty were requisite in order to raise the sums so payable, it could not be requisite until one of those events was in immediate prospect. To turn either real or personal property into money at an earlier time and keep it on hand as money, uninvested, would be of no benefit to the *cestui que trust*. No power of sale to be implied under the circumstances of the case could be exercised by the executor before the estate passed into the hands of the trustee. As the executor was not to make the payments in question, they could furnish no occasion for him to make a conversion; and unless the testatrix cast either upon him or upon the trustee a power and duty of immediate conversion, the decree of the Court of Probate was correct.

The doctrine of equitable conversion is simply an application of the fundamental principle that equity regards that as done which ought to be done. Unless a sale of the Connecticut real estate ought to have been made as soon as

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practicable after the decease of the testatrix, it is not to be regarded as having the character of personal estate. If a sale ought to have been made, it is because a power to sell is implied from the terms of the residuary clause, and is necessary to give that clause its due effect. The heirs at law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale, in favor of Mr. Clarke, either as executor or as trustee. The dominant and controlling words in the fifth article of the will are those by which the testatrix gives, devises, and bequeaths her residuary estate, "real and personal of whatsoever description and wherever situated," to her husband and children, to be divided equally between them *per capita*, "to each and to their heirs and each of them forever." The provisions for a temporary trust in respect to the share of each child are subsidiary. They are for the sole benefit of the children, and it is highly improbable that they were intended to curtail the beneficial estate absolutely given to their father, by requiring that it should be turned into money, either before he received it or as soon as he received it. It is much more natural to suppose that the word "pay" was used for "transfer," and "sum" as the equivalent of what in the same sentence is described as a "share."

It is suggested that Mrs. Clarke must have known that her real estate was scattered through four States, and that the laws of some of these States as to the distribution of intestate estates differed widely from that of South Carolina; and therefore is to be presumed to have intended to provide for the event of the decease of one of her children during minority, by directing such a sale as would make their shares at once subject to the laws of her domicil. The appellant also contends that an obvious motive for directing such a conversion was securing the higher rate of income which would probably be derived from investments made in her own State, as well as the greater safety from having them more immediately under the eye of the trustee. It is

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evident that both the will and codicil were prepared by counsel familiar with the ordinary terms of testamentary disposition. The codicil was executed at her own home, and the utmost solicitude was evinced in it to protect the interest of those who were to receive her residuary estate, by stating explicitly what the law would have sufficiently implied, that they should ultimately receive the funds set apart for the benefit of the two annuitants. Had it been the desire of Mrs. Clarke that her decease should be followed by an immediate sale of all her lands, her counsel could have found no difficulty in expressing this with equal distinctness.

The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell or of any absolute necessity to sell, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. *Hunt's and Lehman's Appeal*, 105 Pa. St. 128, 141. No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money. *Hobson* v. *Hale*, 95 N. Y. 588; *Hale* v. *Hale*, 125 Ill. 399, 17 Northeastern Rep. 470.

If the question were one not directly involving the mode of passing title to lands in this State, the rules of international comity might require us to accept the interpretation of the will established in the courts of South Carolina. *Rockwell* v. *Bradshaw*, 67 Conn. 8, 14. Such would be the case, for instance, if the point in controversy were whether a certain devise of lands in this State, which was inoperative under our laws for want of some statutory formality, if accompanied by a legacy to the heir at law, might not impose

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upon him the personal obligation of electing whether to take the bequest and give effect to the devise by a voluntary conveyance, or keep his land and lose his legacy. *Trotter* v. *Trotter*, 4 Bli., N. S. 502. Similar considerations might apply to the construction of a legacy to a wife, in respect to whether it was in lieu of dower or not. *Washburn* v. *Van-Steenwyk*, 32 Minn. 336; *Van Steenwyk* v. *Washburn*, 59 Wis. 483; *Lee* v. *Tower*, 124 N. Y. 370. So, if the power claimed were one of appointment, that it affected lands in this State would not deprive the court of the domicil of its right to interpret authoritatively the meaning of the terms employed in the will, which though drawn in Connecticut was, by the codicil, republished in South Carolina. But the power which that court has found to be implied from the language of the testatrix, is one of sale. An appointment under a power of appointment as to lands, passes the title to them by virtue of the will, which is, itself, the conveyance, and the only one. A power of sale, on the other hand, imports only a power to convey by an independent conveyance drawn and executed with all the formalities and subject to all the conditions incident to ordinary deeds. That the will is duly executed for the disposition of real estate is sufficient to support the exercise of a testamentary power of appointment, in the manner directed by the testator; but it is not sufficient to dispense with a deed of the ordinary form, where the power is one to sell and convey. The question then is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease, by his authority, which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could, under its provisions, have executed a deed sufficient under the laws of Connecticut, to transfer title to real estate. Whether this could have been done or not is necessarily a matter to be decided according to those laws, as they may be interpreted by the judiciary of Connecticut. *White* v. *Howard*, 46 N. Y. 144, 159; Wharton on Confl. of Laws, § 597; *Page's Estate*, 75 Pa. St. 87.

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The case of *Ford* v. *Ford*, 80 Mich. 42, in which the construction given to a Wisconsin will by a Wisconsin court (*Ford* v. *Ford*, 70 Wis. 19, 72 Wis. 621), as to its working an equitable conversion of the real estate of the testator situated in Michigan, was followed, stands upon two grounds: that the decision of the court of the testator's domicil was conclusive, and that it was correct. The latter was, of course, sufficient to support the judgment. Considerable reliance seems also to have been placed on the provision of the Code of Michigan that upon probate there of a foreign will, affecting property in Michigan, it should be disposed of according to the will "so far as said will may operate upon it." Similar weight was properly accorded in *Guerard* v. *Guerard*, 73 Ga. 506, 509, to a section of the Georgia code making the law of the place where any writing is executed controlling as to its effect. In *Crusoe* v. *Butler*, 36 Miss. 150, the deed of an executor under a power conferred by an Alabama will was held to pass title to lands in Mississippi, the power having been executed in a manner which the courts of Alabama had adjudged to be sufficient, although not in accordance with the law of Mississippi. Here, however, the Alabama decision had been rendered in a suit between the same parties or those with whom they were in privity, and that in Mississippi was plainly justified by the doctrine of *res adjudicata*.

One of the claims set up in behalf of Nancy B. Clarke remains to be noticed. It is that under the statute of uses no effectual trust in the lands in question was created, since no active duties were imposed upon the trustee.

This position is untenable. The terms of the devise and bequest of his daughters' shares to Mr. Clarke in trust, invested him with the legal title, and sufficiently implied a right to hold and manage these estates until the events should occur upon which they were to be turned over to their own control. So far as respects the share of Julia Clarke, her death in infancy has rendered the occurrence of these events impossible; but that Mr. Clarke has now become as to that the holder of a simple or naked trust, does

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not affect the fact that his trust was originally an active one. The legal estate devolving upon him and the beneficial estate given to his daughter were vested in each upon the decease of the testatrix. Upon the death of Julia Clarke, her interest in any lands in this State under her mother's will passed to her sole heir at law, in whose favor the decree appealed from was made.

The Superior Court is advised to affirm the decree of the Court of Probate.

In this opinion the other judges concurred.

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In re The Wilcox and Howe Company.

Third Judicial District, Bridgeport, Oct. Term, 1897. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

Chapter 212 of the Public Acts of 1895 provides that all contracts for the sale of personal property (with certain exceptions) conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing, and acknowledged and recorded within a reasonable time in the town clerk's office in the town where the vendee resides; and that all sales not so made shall be held to be absolute sales, except as between the vendor and the vendee "or their personal representatives." *Held* that in view of the remedial nature of the statute, the receiver of an insolvent corporation, who had come into possession of certain machinery which had been purchased by the corporation under conditional contracts of sale not made in conformity with the statute, ought not, in respect to such property, to be regarded as the "personal representative" of the corporation, but rather as the agent of creditors, whose rights he was appointed to protect and enforce; and therefore that the machinery must be regarded as the absolute property of the corporation, so far as it might be needed by the receiver for the payment of debts.

The term "personal representatives" has acquired no fixed, technical meaning. It may under certain circumstances be held to include trustees in insolvency and receivers, as well as executors and administrators; for the former for some purposes as truly represent the debtor as the latter do the deceased.

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A chattel mortgage not recorded until long after the receiver of the mortgagor had taken possession of the property, is not valid as against him.

Recitals in a chattel mortgage or conditional contract of sale, which might perhaps have estopped the vendee from claiming that the instrument had not been properly recorded, cannot estop the latter's receiver, since in this particular he represents creditors.

[Argued November 3d, 1897—decided January 5th, 1898.]

APPLICATION to the Superior Court in Fairfield County by a receiver, to determine the rights of certain creditors who, as conditional vendors, claimed title to machinery in the receiver's possession; facts found and case reserved by that court, *Elmer, J.*, for the consideration and advice of this court.

The material facts in the agreed statement, are these:

The Wilcox & Howe Company is a joint stock corporation duly organized under the laws of Connecticut, and located and having its place of business in the town of Huntington, in Fairfield county. It is largely indebted and insolvent. The receiver of said corporation was duly appointed on the 8th day of October, 1896, upon an application for the winding up of the affairs of said company, pursuant to the statute. Since the 8th of October, 1896, the receiver has been engaged in the duties of his appointment, and the affairs of said corporation are now being wound up in the Superior Court for Fairfield county.

All of the respondents to said application, except J. J. McCabe who did not appear, now are, and at all times since the appointment of said receiver have been, ready and willing to perform the agreements made and to be performed by them respectively, as set forth in the contracts hereinafter referred to. All of the respondents notified the receiver, within a reasonable time after his appointment, that the several machines claimed to belong to them respectively, as hereinafter described, were in the possession of said Wilcox & Howe Company, at the time of his appointment, under the terms of the several contracts hereinafter set forth. The receiver upon taking possession, under his appointment, of the property of the corporation, found in its shop and in use

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by it, certain machinery which had been delivered to it by the parties hereinafter named under the agreements hereinafter described.

The Waterbury Farrell Foundry and Machine Company, of Waterbury in this State, had delivered machinery to the Wilcox and Howe Company, under three separate written agreements in the form of, and called, "conditional leases," containing, among other things, an agreement that upon the payment in full of the price of said machinery, in the form of rent, said machinery should become the property of the Wilcox and Howe Company. The leases also contained the following provisions, among others: "And the said Wilcox & Howe Co. agrees to have this lease recorded immediately, if by law required to be recorded in the State where said Wilcox & Howe Co. is located and doing business. And if default shall at any time be made in the payment of rent as aforesaid, or any of the agreements herein shall be violated, then this lease shall be void." Said three written agreements were dated respectively December 14th, 1895, May 25th, 1896, and June 25th, 1896; each was witnessed by one witness; none of them were acknowledged, and none of them were ever recorded in the town clerk's office of the town of Huntington where said corporation, the Wilcox & Howe Company, was located. Prior to the appointment of said receiver certain payments had been made under the first two leases, but nothing had been paid under the last one. Within the time limited by the court for the presentation of claims against the Wilcox & Howe Company, the Waterbury Company presented a claim to the receiver for the balance, with interest, due under said agreements, and also claimed that the payment of the amounts due was secured under said agreements, which, it further claimed, were as binding on said receiver as the same would have been on the Wilcox & Howe Company.

The Merrill Brothers of Brooklyn in the State of New York had delivered machinery to said corporation, under a written agreement which reads as follows: "This agreement made the 13th day of January by us, The Wilcox and Howe Company, of Derby, Connecticut, witnesseth: That in con-

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sideration of the sale and delivery to us of the drop hammers hereinafter mentioned by Merrill Brothers of Brooklyn, New York, and of one dollar by said Merrill Brothers in hand paid, we have bargained and sold by these presents to said Merrill Brothers, two certain drop hammers now in our factory at Derby, Connecticut, to them, their representatives and assigns forever. This sale is conditional upon the payment by us, of each and every of twelve promissory notes given in payment for said chattels, aggregating the sum of twenty-four hundred ($2,400) dollars, to wit: one note due March 20th, 1896, for $200, and eleven other notes for $200 each, due successively at the end of every succeeding thirty days thereafter, with interest. It is expressly agreed that upon default in the payment of the principal or interest of any of said notes, or the removal of said drops from said factory, or in case said Wilcox & Howe Company shall sell, encumber, or suffer to be encumbered by any lien or process, the said drop hammers, the whole of said principal sum shall become due with interest, and said drop hammers shall become the property of said Merrill Brothers, and they may enter the premises where said drop hammers are, and take, carry away and dispose of the same. Upon payment of all of said notes and interest in the manner and at the time hereinbefore provided, and the due observation of the other condition herein, these presents shall have no effect. In witness whereof, we have hereunto set our hands and seal, the day and year first above written. The Wilcox & Howe Co., Isaac P. Howe, Sec. and Treas. (Seal.) Signed, sealed and delivered in presence of Edwin B. Gager. Helen E. Bailey." This instrument was duly acknowledged, and was recorded in the office of the town clerk for the town of Derby, on the 9th day of March, 1896, and in the office of the town clerk for the town of Huntington, on the 6th day of January, 1897. Merrill Brothers claimed that the machinery described in said instrument either belonged to them, or that they had a chattel mortgage thereon to secure the sum due to them.

The Pratt and Whitney Company of Hartford in this State

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had delivered machinery to the Wilcox and Howe Company, under a written agreement dated June 8th, 1896, in the form of a lease, containing among other things an agreement, in substance, that upon the performance of certain conditions, including the payment of the price of said machinery with interest, said machinery should become the property of the Wilcox and Howe Company. This instrument was not acknowledged, but it was on the 24th of August, 1896, recorded in the office of the town clerk for the town of Huntington.

J. J. McCabe and Company of the city of New York had delivered certain machinery to the Wilcox and Howe Company, under and pursuant to the following writing: "Order No. 14 Dey Street, New York, Dec. 4th, 1895. Consignment account, Stored at Wilcox & Howe Co.'s, Birmingham, Conn. to J. J. McCabe, Dr. To 1 new Upright Drill, 24″ swing, with back gears, ... $150.00; 1 new Engine Lathe, 14″ swing, 6 ft. bed, with . . . . $237.50; $387.50. Shipped via. N. Y., N. H. & H. R. R. Terms: Rental 5% each month for 12 months. Same to apply on purchase if the machines are to be retained. Payments to include interest at 6%." No contract or instrument in writing, concerning the machinery described in said writing, was ever recorded in the town clerk's office of the town of Huntington.

The New Haven Manufacturing Company of New Haven in this State had delivered machinery to the Wilcox and Howe Company, under and pursuant to a written agreement, in the form of a receipt, in which, in substance, it was agreed that the machinery mentioned therein, which the Wilcox and Howe Company therein acknowledged it had received from the New Haven Company, should be and remain the property of said New Haven Company till the price of the same, stated in said agreement, should be paid in full, when said machinery should become the property of said Wilcox and Howe Company. This instrument was dated the 24th day of October, 1895, but it was not acknowledged, nor was it ever recorded in the town clerk's office of the town of Huntington.

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The Farist Steel Company of Bridgeport in this State had delivered to the Wilcox and Howe Company a machine called a "Merrill Drop," under a parol agreement by which the latter company was to pay to the Steel Company twenty dollars per month as a rental, and the title to said machine was to vest in the Wilcox and Howe Company when four hundred dollars, the purchase price, had been paid in full. There was no written contract as to said drop, and nothing is upon record pertaining to the same in the town clerk's office of the town of Huntington.

Prior to the appointment of the receiver, the Wilcox and Howe Company had made payments on account, under said agreements, to Merrill Brothers, the Farist Steel Company, J. J. McCabe & Company, and the New Haven Manufacturing Company. Nothing had been paid on account to the Pratt and Whitney Company. Each of said last five named parties claimed that the amounts with interest due to them respectively, under said agreements, were secured to each of them upon the machinery described in said agreements, and that said agreements were as binding upon the receiver as they would be upon the Wilcox and Howe Company. All of said machinery has hitherto remained and still is in the possession of the receiver, and has been used by him from time to time in the prosecution of the business of the company as conducted by him, and he has paid nothing on account thereof.

The questions reserved are stated as follows: 1st. Are the several contracts mentioned in said statement of facts binding upon said receiver in the same manner as they would have been on said Wilcox & Howe Company; or does said receiver hold said machines mentioned as the absolute property of said company? 2d. Do said several parties mentioned in said statement of facts, or any of them, retain title to the machinery therein mentioned, as against said receiver? 3d. Ought said several claims to be allowed as general unsecured claims? 4th. Shall said several sales mentioned in said statement be held to be absolute sales, as between the vendors and said receiver? 5th. Do said Merrill Brothers,

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as against said receiver, hold any title in a lien on the machines described in said agreement of January 13th?

Edwin B. Gager, for the receiver.

The contracts in question are undoubtedly conditional sales. *Robinson's Appeal*, 63 Conn. 290; *Beach's Appeal*, 58 id. 464; *Appleton* v. *Norwalk Library Corporation*, 53 id. 4; *Loomis* v. *Bragg*, 50 id. 228; *Hine* v. *Roberts*, 48 id. 267. The real question is whether the language of the Act of 1895 includes a receiver of a corporation appointed under the statute for the winding up of corporations. The term "personal representatives," so far as we have been able to find, is uniformly held to mean "executors and administrators," and it means nothing else. *Pixley* v. *Eddy*, 56 Conn. 338; *Oates* v. *Union Pacific R. Co.*, 104 Mo. 514; Black's and Bouvier's Law Dict. Under the decisions of this court the receiver of a corporation represents the creditors, and as such representative has the same rights that an attaching creditor would have; and therefore with respect to the statute in question, he must be considered as standing in the position of an attaching creditor. *Greene* v. *Sprague Mfg. Co.*, 52 Conn. 361; *New Haven Wire Co. Cases*, 57 id. 387; *In re Waddell-Entz Co.*, 67 id. 333. The rights of a receiver are substantially those of a trustee in insolvency. *Shaw* v. *Smith*, 48 Conn. 313; *Shipman* v. *Ætna Ins. Co.*, 29 id. 254.

Nathaniel R. Bronson, *John W. Bristol*, *Carl Foster*, with whom was *A. B. Beers*, and *Daniel E. McMahon*, for the different claimants.

The Act of 1895 is not to be extended by construction "beyond the clear import of the language used." Suth. on Stat. Constr., §§ 139, 290, 400; *State* v. *Costello*, 61 Conn. 497, 499; *People* v. *Palmer*, 109 N. Y. 110, 117, 118. The conditional sales in question are within the exception of the Act: (1) because the receiver derives no title to the property of the corporation, and *a fortiori* no title to the property in question; (2) because he represents and stands in the place of the corporation so far as this question is concerned; and (3) because

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he is the "personal representative" of the corporation, the conditional vendee. Our statute (Gen. Stats. § 1322) gives the *right of possession* to the receiver, but it is the general principle that a receiver, unless vested with a title to the property by statute, has no title thereto. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236; *Quincy M. & P. R. Co.* v. *Humphreys*, 145 id. 82, 97; *Ellis* v. *B. H. & E. R. Co.*, 107 Mass. 1, 28. There are no cases in Connecticut which support a different doctrine. But if it be assumed that some title or right of lien does pass to a receiver of a joint stock corporation, under our statute, still the receiver represents and stands in the shoes of the corporation for most purposes, and can enforce only such rights as the corporation itself could enforce. *Greene* v. *Sprague Mfg. Co.*, 52 Conn. 361; *Republic L. Ins. Co.* v. *Swigert*, 135 Ill. 150, 165; *Farnsworth* v. *Woods*, 91 N. Y. 308, 313; *Ins. Co.* v. *Hill*, 60 Me. 178, 182; *Waterhouse* v. *Jamieson*, L. R. 2 Scotch & Div. App. 29, 36; *In re Duckworth*, L. R. 2 Ch. App. Cas. 578, 580; *Pittsburg Carbon Co.* v. *McMillin*, 119 N. Y. 53. But in any event, the receiver of such a corporation is the "personal representative" of the corporation, because he has only such rights as the corporation itself had, except in cases of fraud. High, Rec., § 315; *Curtis* v. *Leavitt*, 15 N. Y. 44. The statutory exception in terms applies to every conditional vendor and vendee, and therefore includes corporations. The statute clearly contemplates that every such vendor or vendee may have "personal representatives." A fair construction of these words would seem to be that they mean such legal representatives as have no greater rights than those whom they represent had. Such a construction would bring within the statute *bona fide* purchasers for value, and attaching creditors, but would exclude assignees who had paid nothing or who took with notice, bailees without hire, and all persons claiming under the conditional vendee who acquire no title to or lien upon the property in question. Gen. Stats. § 2961; 2 Jon., R. P. §§ 1385, 1386; *Fosdick* v. *Schall*, 99 U. S. 235, 250; *Central Trust Co.* v. *R. R.*, 48 Fed. R. 868, 872. The receiver was entitled to a reasonable time

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to elect what course he would adopt toward this machinery, but having continued to use it after being notified of the conditions of the sale, should be bound by the terms of the contract. Sm. Rec., § 125; 2 Platt, Lease, 435; *Quincy, etc., R. Co.* v. *Humphreys*, 145 U. S. 82; High, Rec., § 273; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313.

TORRANCE, J. The statute (Public Acts of 1895, Chap. 212) under which the questions presented upon this reservation arise, reads as follows: "Section 1. All contracts for the sale of personal property, except household furniture, musical instruments, bicycles, and such property as is by law exempt from attachment and execution, conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing, describing the property, and all conditions of said sale, acknowledged before some competent authority, and recorded within a reasonable time in the town clerk's office in the town where the vendee resides.

"Sec. 2. All conditional sales of personal property which shall not be made in conformity with the provisions of the preceding section shall be held to be absolute sales, except as between the vendor and the vendee or their personal representatives, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee, in the same manner as any other property not exempted by law."

Leaving out of consideration for the moment the Merrill Brothers' contract, there can be no doubt that all the others are, and were intended to be, conditional contracts of sale; for in each, by force of the contract, the general property in the subject-matter of the contract is ultimately to pass, for an agreed price in money, from its owner to the Wilcox & Howe Company, on the performance by it of certain conditions; and where this is intended to be the effect, operation and main purpose of the contract, it will, as a rule, be held to be one of conditional sale, without much regard to the name or the form the parties may give to it. *Hine* v. *Roberts*, 48 Conn. 267; *Loomis* v. *Bragg*, 50 id. 228; *Beach's Appeal*, 58 id. 464; *Robinson's Appeal*, 63 id. 290.

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Counsel for Merrill Brothers claims that the contract with them should also be regarded as one of conditional sale, rather than as a chattel mortgage; and for the present we will so regard it. All of these contracts, then, are for the sale of personal property within the operation of the statute, and they are upon condition that the title thereto shall remain in the vendor after delivery, and are consequently conditional contracts of sale within the meaning of the statute. None of these agreements fully complied with the provisions of the first section of the Act in question. The Waterbury Company's agreements were not witnessed, nor acknowledged, nor recorded as the Act requires. The Merrill Brothers' agreement was not recorded in the town of Huntington till long after the receiver was appointed and qualified. The Pratt and Whitney Company agreement was not acknowledged as the Act requires, nor at all. The McCabe & Company's agreement can hardly be said to have been in writing within the meaning of the statute, for it was a mere statement signed by no one; and it was not witnessed, acknowledged, nor recorded as required by the Act. The New Haven Manufacturing Company agreement was not witnessed nor acknowledged, nor recorded as the Act requires; and the Farist Steel Company's agreement was not in writing at all.

This being so, the conditional sales evidenced by these conditional contracts of sale, by force of the statute, are to "be held to be absolute sales, except as between the vendor and the vendee or their personal representatives."

Under the statute, then, as between all these conditional vendors and the Wilcox and Howe Company, or the personal representatives of that company, these contracts remain conditional contracts of sale, with the property in this machinery still in the vendors; while as between the vendors and the creditors of the Wilcox and Howe Company, the machinery covered by these contracts is the absolute property of that company. And the main, important question in the case is, whether the receiver is the "personal representative" of the company as to these contracts, within the meaning of the statute.

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Experience has shown that great evils have resulted to creditors and *bona fide* purchasers, from the existence, without notice to the world, of conditional sales like those here in question; and as this statute was evidently passed to remedy to some extent those evils, it should receive such a construction as will best carry out the purpose of the statute. One main purpose and object of the statute is to protect creditors of, and *bona fide* purchasers from, the vendee in such contracts. As to them and as to those who by a limited or by a universal succession represent them, the sale is an absolute one. They take the benefits of the contract without its burdens. As between the vendor and vendee and their personal representatives, the sale remains as it was made, a conditional one. They, as between themselves, take alike the benefits and the burdens of the contract. The statute plainly embraces all contracts of the kind here in question; contracts made by natural persons who may die and be represented by universal successors known as executors or administrators, and contracts made by natural persons whose estate, in their lifetime, may through insolvency or bankruptcy proceedings pass to trustees or assignees as their limited successors and representatives; and contracts made by corporations whose estate, during the existence of the corporation or after its dissolution, may through like proceedings, be transferred to receivers or trustees or assignees as the limited successors and representatives of the corporation.

Counsel for the receiver contends that the words "personal representatives," as used in this statute, mean executors and administrators only, and it may be conceded that this is their usual and ordinary meaning when the personal representatives of deceased persons alone are spoken of. *Pixley* v. *Eddy*, 56 Conn. 336, 338. But the statute is dealing with all contracts of this kind, as well those made by natural persons who after death can be represented by executors or administrators, as those made by corporations who cannot be so represented; and to give to the words in question the narrow construction contended for would, to a certain extent at

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least, defeat the manifest intention of the legislature in the passage of this Act.

At common law the heir succeeded to the real estate of the deceased ancestor, and was for this reason sometimes called a "real" representative; while the executor or administrator who succeeded to the personal estate of the deceased, was for this reason called the personal representative. *Card* v. *Card*, 39 N. Y. 317, 323. But the words "personal representatives" standing alone, do not necessarily include only executors and administrators; they have acquired no such fixed, definite, technical meaning. A trustee in insolvency and an assignee in bankruptcy, for many purposes stands in the shoes of the debtor and represents him, and speaking generally is, to the extent of the estate committed to his charge and for such purposes, as truly the personal representative of the debtor, as the executor or administrator is the personal representative of the deceased; and for all practical purposes, and speaking generally, no distinction can be made, in this respect, between a trustee in insolvency or an assignee in bankruptcy, and a receiver appointed under our statutes. We think the words "personal representatives," as used in this statute, may reasonably be held to include in addition to executors and administrators, at least trustees in insolvency and receivers. For most purposes the trustee in insolvency and the receiver stand in the shoes of the debtor and represent him; but they also, for some purposes, stand in the shoes of creditors and represent them. "While it is true that the trustee can exercise some rights which are not in the insolvent, such as the setting aside of preferences and the recovery of property conveyed in fraud of the rights of creditors, yet as a general rule he is entitled to have and do only what the insolvent could have had and done; must take the estate with the burdens placed thereon by him, with all outstanding equities against it." *Merwin* v. *Austin*, 58 Conn. 22, 34. "The receiver for most purposes represents and stands in the place of the corporation, and can enforce only such contracts and rights as it could enforce. But when acts have been done by the corporation in violation of law and in fraud

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of creditors, the receiver, who for all beneficial interests connected with the trust is regarded as the representative of the creditors, may repudiate their acts, taking care, however, that third parties who are without fault do not suffer. Such cases, however, are exceptions to a general rule, and it should clearly appear that the case is within the exception." *Greene* v. *Sprague Mfg. Co.*, 52 Conn. 330, 361; *Litchfield Bank* v. *Peck*, 29 id. 384; *New Haven Wire Co. Cases*, 57 id. 352.

As the receiver is thus the representative of the corporation for some purposes, and may for such purposes be called its personal representative, within the meaning of the statute, and as he also represents creditors for some purposes, the precise question here is whether the receiver, *quoad* these conditional contracts of sale and the property covered by them, is the personal representative of the corporation within the meaning of the statute; and we are of opinion that he is not.

The commencement of proceedings for the appointment of a receiver of a corporation, or of a copartnership, dissolves all attachments and all levies of executions not completed, made within sixty days next preceding, on the property of the corporation or copartnership. Public Acts of 1895, Chap. 96. And by the appointment of a receiver the rights of creditors to attach or levy upon such property are suspended. *New Haven Wire Co. Cases*, 57 Conn. 352; *Longstaff* v. *Hurd*, 66 id. 350, 359. The law thus disables the creditors from interfering with that property, or from in any way appropriating it for their sole benefit; but in so doing it does not lessen their rights with respect to such property, nor does it destroy them; it merely provides for their protection and enforcement in another way. And whenever the law thus disables creditors from helping themselves, whether by proceedings in insolvency or bankruptcy, or by the appointment of a receiver or otherwise, it provides for the enforcement of whatever rights they may possess against the property of the debtor, through the instrumentality of its agent, the trustee, assignee or receiver. For the purpose of enforcing any such right which the creditor could have

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enforced for his sole advantage, and for the purpose of holding or taking any property which a creditor could hold or take by law, or for recovering back any property of which a creditor could avail himself in payment of his debt, the trustee, assignee, or receiver is in effect the creditor, as this court has repeatedly decided. *Swift* v. *Thompson*, 9 Conn. 63; *Rood* v. *Welch*, 28 id. 157; *Shipman* v. *Ætna Ins. Co.*, 29 id. 245; *Gaylor* v. *Harding*, 37 id. 508; *Taylor* v. *Atwood*, 47 id. 498; *Shaw* v. *Smith*, 48 id. 306; *Litchfield Bank* v. *Peck*, *Greene* v. *Sprague Mfg. Co.*, and *New Haven Wire Co. Cases*, *supra*.

It is of no importance, so far as the present discussion is concerned, whether such agent of the law takes the technical title to the debtor's property, or takes only the possession of it; in either case he is the sole agent through whom, and through whom alone, as a general rule, the rights of creditors can be protected and enforced; and in protecting and enforcing those rights he is the representative of creditors and not of the debtor.

In the case at bar, the machinery covered by the conditional contracts of sale was, as to the creditors of the Wilcox and Howe Company, the absolute property of that company. It was available to the creditors in payment of their debts, and could have been appropriated for that purpose by attachment and levy of execution. When it came into the hands of the receiver of the insolvent corporation, the law sequestered it, on behalf of the creditors and for the benefit of all of them, as the absolute property of the corporation, just as fully and just as effectually as the creditors could have sequestered it by attachment and levy. For the purpose of making that sequestration effectual the receiver is the representative of the creditors, and holds the property, as they would have held it by proper proceedings, as the absolute property of the corporation. In a case like the present, a dispute as to the ownership of property between the receiver and the conditional vendors, is, in effect, and must be regarded as, one between such vendors and the creditors of the conditional vendee; and in such a case the

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statute imperatively requires that the property in dispute shall be held to be the absolute property of the conditional vendee.

The claim is made on behalf of Merrill Brothers that their contract, if not valid as a conditional sale, may be good as a chattel mortgage. But it was not recorded as such a mortgage is required to be recorded, until long after the receiver took possession, and therefore as to him, as the representative of creditors, it was not a valid mortgage under the circumstances. It was also claimed on behalf of Merrill Brothers that the Wilcox and Howe Company would be estopped by the recitals in the contract, from claiming that the contract was not properly recorded as a chattel mortgage or conditional contract of sale, in the town of Derby. Whether the company would be so estopped or not, we have no occasion to decide, for it is certain that the receiver as the representative of creditors is not so estopped.

The Superior Court is advised that all the machinery covered by all the contracts here in question, should be held by the receiver as the absolute property of the Wilcox and Howe Company, so far as the same may be necessary for the payment of its debts, and that the claims of the conditional vendors should be allowed only as general unsecured claims.

In this opinion the other judges concurred.

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TIMOTHY H. PORTER *vs.* THOMAS G. RITCH ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Chapter 162 of the Public Acts of 1889 relating to the commitment of insane persons, provided (§ 6) that "pending proceedings" for the hearing and examination, the judge of probate might make and enforce such reasonable orders for the care and custody of the person alleged to be insane, as he should deem suitable and proper. *Held*:—

1. That this provision for the temporary detention and restraint of the individual alleged to be insane, was not an infringment of the constitutional right of personal liberty, but a justifiable regulation of that right in the interest of society.
2. That the "proceeding" mentioned in the statute was not an ordinary "action" at law, which would be pending only from the service of process upon the adverse party, but an inquest of insanity, a police regulation; and therefore was "pending" as soon as the complaint had been referred to the judge.
3. That an order for the temporary detention of the person alleged to be insane, pending a hearing upon the complaint, was merely a part of the procedure and not an adjudication which entered into the judgment or decree.

If the plaintiff intends to prove that the acts charged against the defendant were committed by his agent, the complaint should aver the agency, otherwise the evidence will be excluded on objection.

A statement by a witness that the members of a literary club considered a paper read by the plaintiff as one of the strongest they had had, is hearsay and irrelevant upon the question of the plaintiff's sanity.

Where the defendant's action is claimed to have been malicious, he may show that he acted upon the advice of counsel in all that he did.

It is within the discretion of the trial court to exclude a hypothetical question, until a foundation for it has been laid by the evidence.

The trial court found that a certain written agreement set forth at length by the defendants in their answer as a release and discharge of the cause of action alleged by the plaintiff, was intended by all the parties to accomplish and did effect a full and final settlement of all claims, questions and differences between them, as averred by the defendants; and that said agreement was not executed by the plaintiff under duress, as averred by him in his reply, but voluntarily and under the advice of his friends and counsel. *Held* that this finding constituted an absolute bar to the plaintiff's entire action; and that if the plaintiff had desired to raise the claim that the written agreement did not by its terms operate to bar his action,

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and that the intent of the parties that it should have that effect was unavailing because not so expressed in it, he should have demurred.

[Argued November 5th, 1897—decided January 5th, 1898.]

ACTION to recover damages for the unlawful detention and restraint of the plaintiff, brought to the Superior Court in Fairfield County and tried to the court, *Prentice, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff for alleged errors in the ruling of the court. *No error.*

The complaint in this action is in three counts. The gist of the whole action is that the defendants conspired together to obtain from the plaintiff a very large sum of money, and that in pursuance of such conspiracy they made a false and malicious complaint to the judge of probate in the district of Stamford, in which district the plaintiff resided, therein representing that the plaintiff was insane and unfit to go at large, and obtained from the said judge an order that the plaintiff be committed to the custody of two of the defendants; that by reason of the said order they arrested the plaintiff and kept him in imprisonment for three months and until they had extorted from him more than $100,000; and that by reason of said imprisonment the plaintiff was greatly injured in his health. All the acts for which relief is sought in the complaint, were done in the procuring or execution of the said order and the conspiracy in pursuance of which it is alleged such acts were committed.

The answer contains four defenses, either one of which, if sustained, would defeat the plaintiff's action. They are the general issue, a plea in bar which sets up a lawful order of the Court of Probate in obedience to which all the acts were done, a former judgment, and a discharge. Summarizing all the facts of the answer and putting them into one connected story, it is this:—

On the 18th day of December, 1893, Schuyler Merritt, one of the defendants, acting in good faith and fully believing that the plaintiff was an insane person, and that the safety of himself and of others required that the plaintiff should be

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placed under restraint or in the care and custody of some suitable person, made an application to the Court of Probate in the district of Stamford, as follows, as appears by the records of said court: "In the matter of the complaint of Schuyler Merritt, for a hearing regarding the alleged insanity of Timothy H. Porter.

"To the Hon. H. Stanley Finch, a judge of Probate within and for the Probate District of Stamford, in the County of Fairfield and State of Connecticut:

"The complaint of Schuyler Merritt, of said town of Stamford, in said County and State, respectfully shows: That Timothy H. Porter, now and for many years last past a resident of said Stamford, is now and has for a long time past been insane, and is a fit subject to be confined in an asylum. Wherefore your complainant prays your Honor to inquire into the alleged insanity of the said Timothy H. Porter, and whether he is a fit subject to be confined in an asylum.

"Dated at Stamford, this 18th day of December, 1893.

"SCHUYLER MERRITT."

The Court of Probate thereupon made an order that a hearing be had on said application at the probate office on the 26th day of December, 1893, at ten o'clock in the forenoon, and that notice of the time and place of hearing, together with a copy of said application, be served on the said Timothy H. Porter, on or before the 19th day of December, 1893. The said Schuyler Merritt at the same time presented to the said Court of Probate the affidavit of Dr. Henry P. Geib, as follows: "In the matter of the complaint of Schuyler Merritt as to the alleged insanity of Timothy H. Porter. I hereby certify that on the 14th and 15th days of December, 1893, I made a personal examination of Timothy H. Porter of said Stamford, and from my knowledge of his case, having been his physician for a long time, and from the facts that have come to my knowledge regarding his condition, I am of the opinion that he is insane, and that he is unfit to go at large, and is a fit subject for confinement in an asylum or other suitable place of detention; for in my judgment he is suffering from post paralytic dementia, and his disease is at that stage where

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he might at any time be seized with homicidal mania, thereby endangering the lives of those with whom he might be thrown in contact, as well as his own. Dated at Stamford, this 18th day of December, 1893. Henry P. Geib." This affidavit was sworn to before competent authority, and the court issued an order, as follows: "In the matter of the complaint of Schuyler Merritt regarding Timothy H. Porter, a supposed lunatic. It is hereby ordered that pending the proceedings for a hearing and an examination on the foregoing complaint, the care and custody of the said Timothy H. Porter is hereby committed to Richard Bolster and Henry E. Schock, judicious and proper persons for that purpose, who shall confine the said Timothy H. Porter under suitable and proper restraint in his home in said Stamford, until said hearing and until further order is made. Dated at Stamford, this 18th day of December, 1893. H. Stanley Finch, Judge of the Court of Probate for the district of Stamford."

In company with a proper officer, and with these papers, the said Bolster and Schock on said day went to the house of the plaintiff. The officer served the said order of notice, and thereafter Bolster and Schock made known to the plaintiff the order by which the care and custody of his person was committed to them. Acting on that order and in the belief that it was a lawful one, and that the plaintiff was an insane person, they remained during the time named in the complaint in the home of the plaintiff, keeping him under suitable and proper restraint, and kept such watch of his movements as was necessary to prevent him from destroying property or doing injury to himself or others. But at no time did they or either of them assault him, or use any force upon his person, or offer him any indignity or incivility.

On the 19th day of December, 1893, the plaintiff prayed out from the Superior Court in Fairfield county a writ of *habeas corpus* against the present defendants, Merritt, Bolster, Schock, and Louis H. Porter, a son of the plaintiff. This writ required the said persons to appear before the said Superior Court on the 21st day of December, 1893. At that time all the respondents named in said writ appeared before

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the Superior Court. The said Merritt and Louis H. Porter made return denying all the allegations of the plaintiff's application, so far as they were charged. The said Bolster and Schock made return setting out all the said proceedings of the said Court of Probate, and assigned the same as the cause of their detention and imprisonment of the plaintiff. To this latter return the plaintiff made reply denying the jurisdiction of the Court of Probate to make the order, and alleging that the order was void on its face, that it was made without hearing, was unreasonable, etc., etc. To this reply the said Bolster and Schock demurred. The Superior Court found the issue for the said Merritt and Porter, that they had "not in any manner detained or restrained said complainant (the plaintiff) or deprived him of his liberty;" and also sustained the demurrer filed by said Bolster and Schock to the reply of the plaintiff to their return, and upon the issue formed by said demurrer found that the said judge of the Court of Probate had jurisdiction of the proceedings set forth in the said return of said Bolster and Schock, and possessed the power under the statute law of the State to make the order set forth therein, placing the plaintiff in the care and custody of the said Bolster and Schock, pending the proceedings for a hearing and examination, as therein mentioned, and that said order was reasonable; and remanded the prisoner to the care and custody of the said Bolster and Schock to be held by them under the said order. From the judgment on this latter issue an appeal was taken by the plaintiff to the Supreme Court of Errors. But no appeal was taken from the judgment on the issue made by the return of the said Merritt and Porter.

On the same day, *i. e.*, the 19th day of December, 1893, an application was made to the Court of Probate in the district of Stamford, by Louis H. Porter, Blachley H. Porter and Arthur K. Porter, minor sons of the plaintiff, by their next friend Schuyler Merritt, praying for the appointment of a conservator over said plaintiff, on the ground that he was mentally unsound and incapable of managing his affairs; which application was duly served and returned, and the

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said Court of Probate ordered the same to be heard before the court on the 3d day of January, 1894.

By reason of the said *habeas corpus* proceedings in the Superior Court and the appeal to the Supreme Court, the several matters and applications in the Court of Probate were continued from time to time until they were all finally terminated as is hereafter stated.

On the 21st day of December, 1893, the plaintiff brought a complaint in the the Superior Court in Fairfield county against the said Merritt, Bolster, Schock and Louis H. Porter, praying that they and each of them be enjoined from interfering with his books and papers, and for other relief; upon which a temporary injunction was issued by a judge of the Superior Court, which, with the said complaint, was served on the persons therein named as defendants. On the 2d day of January, 1894, Schuyler Merritt and Thomas G. Ritch, executors of and trustees under the last will of Louisa H. Porter, the deceased wife of the plaintiff, and Louis H. Porter, Blachley H. Porter and Arthur K. Porter, being persons interested in the said will, brought their complaint to the Superior Court in Fairfield county, alleging that the plaintiff was wasting and conveying away the property of the said estate, and demanding $250,000 damages. The complaint was served and returned to the said Superior Court.

On the 21st day of February, 1894, while all the said suits, applications, actions and appeals were pending in the said mentioned courts and were all being prosecuted, and while other differences, controversies and disagreements existed between the parties or some of them, the plaintiff, the defendants, and Louis H. Porter and Blachley H. Porter, sons of the plaintiff, who were interested in the said matters, questions, and differences aforesaid, met together with the purpose and intention of making a final and complete settlement, adjustment and end of all the said differences, controversies, suits and claims, and entered into an agreement in writing which was executed and delivered by all of the said parties, and is spoken of as the "family agreement." The

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defendants thereupon performed all the provisions and undertakings on their part to be performed, caused all the said applications to be withdrawn and discontinued, and aver that by said agreement and the proceedings thereunder, and by the performance by the defendants of the provisions and conditions thereof on their part to be performed, and by said acts of the defendants, the subject-matter of the present suit and the plaintiff's claims or alleged right of action described in his said complaint, and all of the controversies, questions and claims between the plaintiff and the defendants, were fully and finally adjusted, settled, satisfied and ended.

The plaintiff, in reply, admitted the making and execution of the said family agreement, but says he executed it under duress—the duress of imprisonment mentioned in the complaint. All the issues were found in favor of the defendants, and the plaintiff takes this appeal.

The finding of facts, omitting those paragraphs which speak only of evidential facts, is as follows: "13. The defendant Merritt married the only sister of the plaintiff's said second wife. 14. Said Merritt, with his wife, has for many years resided near to the plaintiff in Stamford, and prior to 1893 was on close terms of intimacy and confidence with the plaintiff and his family. Since this date there has been an estrangement on the part of the plaintiff, growing out of conditions and circumstances which have led up to and culminated in the present controversies; while, on the other hand, and for the same cause, he has been drawn into even closer relations with the other members of the plaintiff's family, who have come to rely upon him as their confidant, adviser and friend. . . . 18. On December 18th, 1893, the defendant Merritt, after consultation with his attorney, Samuel Fessenden, Esq., and acting upon his advice, signed, and, through his attorney, filed with the Court of Probate for the district of Stamford the application appearing in the copy of the records of said court, hereto annexed, and therewith the physician's certificate, likewise appearing in said copy of record, which had been made by Dr. Geib, the family physician, upon application of Mr. Merritt or his at-

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torney for a certificate setting forth his opinion of the plaintiff's mental condition, which he had previously expressed to said Merritt. 19. Said application and affidavit having been filed as aforesaid, said court forthwith issued an order for a hearing thereon, to be held on December 26th, 1893—being the order appearing in said annexed copy of record—and delivered the same to Edward Gorman, a constable of said town, for service; and immediately thereupon said court, upon the motion of the defendant Merritt's said attorney, and relying upon said affidavit, issued the preliminary order for the custody of the plaintiff, likewise appearing in said annexed copy of record, and delivered it to said Bolster and Schock for service. 20. Said Gorman, Bolster and Schock thereupon proceeded together to the plaintiffs' house. Having been in the ordinary course admitted to the plaintiff's presence, said Gorman made due service of said order for a hearing pursuant to its directions. 21. Said Bolster and Schock thereupon presented the order which they had in their hands, as aforesaid, and read it to the plaintiff, in the hearing of his attorney, James H. Olmstead, Esq., who was present. Upon Mr. Olmstead's request, the order was then handed to and examined by him, who then advised the plaintiff that it was his duty to recognize it. The plaintiff thereupon submitted to the authority of said Bolster and Schock under said order, and they forthwith entered upon their duties as the plaintiff's custodians thereunder. . . . 32. On December 19th, plaintiff's counsel obtained from the Superior Court a writ of *habeas corpus* returnable December 21st. 33. Upon the occasion of the hearing upon said writ, it was agreed between counsel that Mr. Henry Stoddard, one of the plaintiff's then counsel, should take possession of the securities and valuable papers in the plaintiff's house, which was immediately thereafter done. This agreement having been made, the terms and conditions of the judgment entered in said proceedings were consented to by the defendants therein. . . . 36. All the acts of the defendants, Bolster and Schock, during the period of the plaintiff's restraint, as aforesaid, which are the acts complained of, were performed by them

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as officers of the law, in the execution and under and within the authority of said order, in good faith and in a full belief in the validity of said order, and with an honest desire on their part to execute it, and in its reasonable execution under the circumstances, as they appeared to them at the time. 37. None of the acts of said Bolster and Schock aforesaid, were done by them as the agents of said Merritt and Ritch, or either of them, unless the law implies such an agency from the facts herein found. . . . 43. During the period that said Bolster and Schock remained in charge of the plaintiff as aforesaid, hearings were from time to time had before the Court of Probate upon said original application, the plaintiff being present, and represented by his counsel, Messrs. Stoddard and Olmstead. 44. Early in January, and before the case for the applicant had been concluded, Mr. Stoddard made to the opposing counsel suggestions of a settlement of the existing differences and controversies. These suggestions were so urgently pressed by Mr. Stoddard, that it was agreed between counsel that the hearing should be suspended, pending an effort by Mr. Stoddard to bring about a settlement. 45. This was done and Mr. Stoddard set about the difficult task which he had set for himself in opposition to views of the parties concerned. . . . 47. He persisted, however, and through the influence which he, with other friends, brought to bear upon the plaintiff, and his appeals to Mr. Merritt and his sons, the latter of whom yielded only with the greatest reluctance, it finally came about that said family agreement—which was prepared and drafted by Mr. Stoddard himself, and which contained provisions which, for the most part, he suggested—was signed and executed. . . . 50. Said family agreement was executed by the plaintiff freely and voluntarily, and under the advice of his friends and counsel, and without any influence having been brought to bear upon him by any person or persons save only his friends and counsel, who, acting solely in his interest, advised and urged him to its execution. 51. None of the defendants, nor any other person acting for them or in their interests, said any word, or did any act whatsoever. 52. Dur-

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ing the negotiations which resulted in the execution of said family agreement, neither of the defendants or their counsel, or any person for or in their behalf, had any interview with the plaintiff, or correspondence with him. All the negotiations leading to said settlement were conducted on his part by his said counsel, Mr. Stoddard, and on the part of the others by Mr. Merritt, said two sons, and their counsel. 53. It was understood, intended and agreed by all the parties to said negotiation and settlement, and to said family agreement, that the same should accomplish a full and final settlement and adjustment of all the existing claims, questions and differences between the parties thereto, and of all legal proceedings then pending, and the subject-matters thereof, and of all matters arising out of the proceedings instituted by the defendant Merritt, as set forth in paragraph 18, in favor of, or against, whatever party, and including all the matters covered by the plaintiff's complaint, all of which antedated said settlement. 54. Upon said March 5th, and immediately upon the delivery of the family agreement, the legal proceedings hereinbefore described, all of which were still pending, were withdrawn, and the restraint exercised over the plaintiff by the presence of the defendants, Bolster and Schock, and their deputies, in the plaintiff's house or otherwise, at once terminated, and the plaintiff was fully restored to his liberty. 55. The defendants, Merritt and Ritch, have performed all the things required of them to be performed by the terms of said agreement. 56. No party to said agreement except the plaintiff, has sought to repudiate it, or done any act to repudiate it. . . . 76. The defendant Ritch in no manner participated in, authorized, instigated or advised the making of said application to the Court of Probate, or the procuring of said preliminary order, or the placing of the defendants, Bolster and Schock, in the plaintiff's premises as aforesaid, or any of the acts described in the complaint. He had no knowledge whatever that said proceedings, or any proceedings of similar character, were contemplated, until after their institution, when he learned of it as a matter of common notoriety. 77. The defendant Merritt did not personally par-

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ticipate in the performance of any of the acts done in the execution of said order, or in the restraint or detention of the plaintiff, or give any of the directions thereto relating. 78. All the acts herein recited as done by the defendant Merritt's attorney, were done by said Merritt's authority and with his approval. 79. The defendant Merritt, and he alone, was the party immediately responsible for the bringing of said application, and its prosecution and continuance as hereinbefore set forth. 80. In so bringing, prosecuting and continuing said application, and in obtaining said temporary order of restraint, and in all that he did in the premises, the said Merritt acted in good faith, and in the full and reasonable belief that said proceedings were legal and valid, and that said steps and proceedings were necessary for the protection of the person and property of the plaintiff and his family. 81. During the year 1893 said Merritt was, by the circumstances existing in the plaintiff's family, brought into especially close relations with its members. By them and others he was, during that time, constantly advised of the plaintiff's conduct. This information, upon which he relied, together with the matters which had come within his own observation and knowledge, and the statements of the family physician, led him naturally and reasonably to the conclusion which he honestly entertained, that the plaintiff's mind was unsound, and that he ought, in the interests of himself and his family, to be subjected to restraint in some proper institution. Said Merritt's fears, as the result of this information and observation, were that the plaintiff, by reason of his unsound mental condition, was, as he was advised by the family physician, liable to do violence; that he, as evidenced by the extensive correspondence with women, discovered by his sons, was in danger of contracting an ill-advised marriage; and that he was liable to waste, squander, misuse or jeopardize the properties in his keeping, if he was not already doing so, as was believed."

Upon the trial the plaintiff made the following legal claims: "(*a*) That chapter 162 of the Public Acts of 1889 is unconstitutional and void, and affords the defendants no legal

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justification for their said acts. (*b*) That said Act, if not unconstitutional in its entirety, is unconstitutional in the provision it makes for the custody of the alleged lunatic pending the proceedings. (*c*) That said original proceedings were not legally pending until notice thereof had been given to the plaintiff of such pendency. (*d*) That said order, issued as and when it was, afforded no justification to any of the defendants for the acts claimed to have been done by them under it, because said court was at the time of its issuance without jurisdiction to issue it. (*e*) That the defendants Merritt and Ritch, having by their attorney fully authorized by them, prayed out said illegal order, are liable to trespass for all that was done under it. (*f*) That said Bolster and Schock were chargeable with knowledge of its illegality, and therefore not justified by it. (*g*) That said order, being issued by the said court without any jurisdiction, it could in law afford no justification to any one for any act done or attempted under it, whether such person actually knew of such want of jurisdiction or not. (*h*) That even if said law was constitutional and valid, and said order legal, the defendants are liable in trespass for the acts done by them to the plaintiff, because said acts were in excess of the authority conferred by said order. (*i*) That by reason of such excess all the defendants became trespassers *ab initio*, and were liable for all the acts of imprisonment as though no order had been issued. (*j*) That the facts in the case in law constitute a conspiracy between the defendants Merritt and Ritch and the two elder sons of the plaintiff, to represent him to be insane, for the purpose of depriving him of his liberty to marry, and of managing his property. (*k*) That the facts in the case establish and constitute in law a conspiracy between said persons to take some measures to restrain the plaintiff, on the ground of his alleged insanity, and that the defendant Ritch, as well as the defendant Merritt, is chargeable in law with all that was in fact done in said insanity proceedings. (*l*) That the defendants Bolster and Schock, having acted as agents of the other defendants, are jointly liable with them as co-conspirators. (*m*) That

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said contract known as the "family agreement" was void, as obtained by duress. (*n*) That said pretended contract was void as being without consideration. (*o*) That said pretended contract was void as founded upon an illegal consideration. (*p*) That said pretended contract, having as an essential part of its consideration an agreement by a minor, which said minor forthwith repudiated and violated, said contract was therefore void and not binding upon anyone. (*q*) That said pretended contract, having as an essential part of its consideration an agreement by executors and trustees of the estate of Louisa H. Porter to abdicate their trust and turn over for an indefinite time all the trust property to other hands, was therefore illegal and void, and not binding upon anyone. (*r*) That said contract did not release or in any manner constitute a bar to the present cause of action. (*s*) That all the defendants, having joined in a special defense of justification, if said defense upon the facts of the case were bad as to any of the defendants it was bad as to all, and the plaintiff is entitled to judgment against all upon that issue. (*t*) That upon the facts found the plaintiff is entitled to judgment against all defendants. (*u*) That upon the facts disclosed by the plea of *res adjudicata* in the third defense, and the exhibits therein referred to, said defense of *res adjudicata* could not be sustained."

Notwithstanding said claims of the plaintiff the court upon the facts aforesaid, rendered judgment for the defendants.

Robert E. DeForest and *Stiles Judson, Jr.*, for the appellant (plaintiff).

The Court of Probate had no jurisdiction to issue the order of custody. *Brooks* v. *Adams*, 12 Pick. 441; *Hall* v. *Howd*, 10 Conn. 519; *Sears* v. *Terry*, 26 id. 285; *Grumon* v. *Raymond*, 1 id. 46. At the time the order of custody was issued, the court had neither jurisdiction of the person, nor of the subject-matter. The court had not jurisdiction of the person, for no proceedings were then *pending*, the summons to answer a "pending" complaint, not having been served upon the plaintiff. *Taylor* v. *Judd*, 41 Conn. 485; *Studwell* v. *Cooke*,

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38 id. 551; *Elting Woolen Co.* v. *Williams*, 36 id. 319; *Sanford* v. *Dick*, 17 id. 216; *Spalding* v. *Butt*, 6 id. 29; *Jenks* v. *Phelps*, 4 id. 152. The mere *issuing* of a summons is not the commencement of an action for general purposes. *Kerr* v. *Mount*, 28 N. Y. 664. If the Act in question authorized the preliminary order of custody without notice and without a hearing to the alleged lunatic, it is unconstitutional. Without this there can be no due process of law. *Stuart* v. *Palmer*, 74 N. Y. 191; *Bostwick* v. *Isbell*, 41 Conn. 305; *Bowler* v. *Eldridge*, 18 id. 1; *Chase* v. *Hathaway*, 14 Mass. 222; *May's Case*, 10 Pa. C. C. 283; *Portland* v. *Bangor*, 65 Me. 120; *Underwood* v. *The People*, 32 Mich. 1; *Morton* v. *Sims*, 64 Ga. 298; *Eddy* v. *The People*, 15 Ill. 386; *McCurry* v. *Hooper*, 12 Ala. 823; *Matter of Blewitt*, 131 N. Y. 546; In *Re Van Auker*, 10 N. J. Eq. 186; *Smith* v. *Burlingame*, 4 Mass. (U. S. C. C.) 121. Undoubtedly any person *without warrant* may lawfully hold a lunatic in physical restraint for a reasonable time, in which to permit of judicial proceedings. This is a common law right; but in exercising that right the person restraining a supposed lunatic must justify, by showing that he was in such condition as reasonably demanded such physical restraint. *Keleher* v. *Putnam*, 60 N. H. 30; *Colby* v. *Jackson*, 12 id. 526; *Look* v. *Choate*, 108 Mass. 116. If the court had no jurisdiction the defendants are trespassers. *Pierce* v. *Thomas*, 11 Conn. 472; *Colt* v. *Evers*, 12 id. 258; *Look* v. *Choate*, *supra*. The defendants Ritch and Merritt, are liable too, because they proceeded maliciously, in legal contemplation. *Humphrey* v. *Case*, 8 Conn. 102; *Stone* v. *Stevens*, 12 id. 219; *Lockenown* v. *Sides*, 57 Ind. 360; *Ives* v. *Bartholomew*, 9 Conn. 309; *Carathers* v. *McIlhenny Co.*, 63 Tex. 143; *Thompson* v. *Rubber Co.*, 56 Conn. 498. The claim, that the particular mode of proceeding was the outcome of *bona fide* consultations with counsel, and for *that* reason, the defendant Merritt is protected from the charge of bad faith in becoming the prosecutor in the steps that followed, is untenable. Their *motives* in seeking to gain that result were improper, and therefore the fact of advising with counsel is no defense. *Grumley* v. *Hotel Co.*,

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38 La. Ann. 974; *Lytton* v. *Baird*, 95 Ind. 349. Ritch gave Merritt *carte blanche* to do whatever he thought proper to do. This is sufficient to render Ritch liable for the acts thereafter performed by Merritt, or under his direction. The "family agreement," if not obtained by duress of imprisonment, was certainly secured through an abuse of legal process, and ought not, therefore, to operate as a legal bar. *Sharon* v. *Gager*, 46 Conn. 189. The real question is, did Mr. Porter act as a free and voluntary agent in divesting himself of his property, in order to secure his liberation. *Walbridge* v. *Arnold*, 21 Conn. 430; *Mills* v. *Swords' Lumber Co.*, 63 id. 105. The authorities clearly recognize a species of *moral duress*. *Bryant* v. *Peck Co.*, 154 Mass. 450; *Schoner* v. *Lissauer*, 107 N. Y. 115; *Baker* v. *Morton*, 12 Wall. 150; *Phelps* v. *Zuschlag*, 34 Tex. 373; 1 Sto. Eq. Juris. §§ 239–253; 2 Pom. Eq. Juris. § 942; *Somerson* v. *Somerson*, 44 N. J. Eq. 93. It is, therefore, idle to argue that this coercion did not constitute duress, simply because Mr. Porter's counsel advised and urged submission. *Cummings* v. *Ince*, 11 Adol. & E. 11. The agreement, if valid, does not purport to release the causes of action *now* pending. There is nothing in the subject-matter of the agreement, or in the facts disclosed on the record, which warrants the suspicion that either party had in mind the claim for damage made in the present suit.

Goodwin Stoddard and *Samuel Fessenden*, for the appellees (defendants).

Chapter 162 of the Public Acts of 1889, under which the plaintiff was temporarily restrained, is constitutional and valid. There is a clear, broad, substantial difference between the authorities cited by the plaintiff and the case at bar, in this regard: that by the issuance of the preliminary order in question there has been no *final adjudication* of the rights of liberty and property of the plaintiff. The authorities cited were cases in which the judgments were *final*. But the preliminary order in this case was only such a temporary and provisional action as comported with the necessities,

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emergencies and exigencies of the situation. This law was passed in the interest of humanity, for the protection of life, and in view of that purpose should be construed by this court. *Doyle, Petitioner*, 16 R. I. 537; *Wellman, Petitioner*, 3 Kan. 100. The distinctions made in these cases clearly apply to the case at bar. The order of custody was not invalid because the proceeding was not legally pending when it was issued. The plaintiff cites authorities holding that civil actions in Connecticut are not deemed to have been commenced until service of the writ upon the defendant. These cases are only applicable to civil actions. This is not a suit; it is a proceeding under a special statute. But if the cases cited were to govern, we are clearly brought within them. A formal petition or application to the court where the court makes an order thereon, stands upon entirely different footing. By making an application take the place of a complaint, the legislature did away with a notice prior to the return. Hence pendency by force of statute dates from the application. *Wentworth* v. *Farmington*, 48 N. H. 207. There is a clear distinction between a suit and a proceeding. 19 Amer. & Eng. Ency. of Law, 220 *et seq.*; *Beresteel* v. *Orvis*, 31 Wis. 117; *Gordon* v. *Tyler*, 53 Mich. 629. The defendants Merritt and Ritch are not liable, even if the order is invalid. The question of their liability has been finally settled by the trial court's decision of questions of fact. The appointees of the court are not in law the agents of the applicant. Their sole authority comes from the Court of Probate. If the Court of Probate had no jurisdiction to make the orders, the court's appointees are not for that reason the agents of the applicant. The custodians of the plaintiff did not act in excess of the authority of the order. The finding settles this as a matter of fact. The question of conspiracy involved in this case was disposed of by the court as a question of fact. The question whether the "family agreement" was obtained by duress, was a question of fact. *Feller* v. *Green*, 26 Mich. 70; *Walbridge* v. *Arnold*, 21 Conn. 431; *McVane* v. *Williams*, 50 id. 530. The conclusion of coercion is not always a necessary one from the fact of unlawful restraint,

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and it must appear that the action of the party has been influenced by it. 6 Wait's Act. & Def. 650; *Feller* v. *Green*, *supra*; *Green* v. *Scranege*, 19 Iowa, 461; *Alexander* v. *Pierce*, 10 N. H. 498. The family agreement was not absolutely void because of the infancy of one of the sons. Tay. on Inf. & Cov. § 14; *Gregory* v. *Lee*, 64 Conn. 407; Note in 18 Amer. St. Rep. 573; *Beardsley* v. *Hotchkiss*, 96 N. Y. 211. The trial court was correct in holding that the family agreement bound the plaintiff and embraces the matters which were the cause of action in the present suit. Such agreements and settlements the courts are inclined to uphold. 2 Beach Eq. § 1003; *Stapilton* v. *Stapilton*, 1 Ark. 2; *Williams* v. *Williams*, L. R. 2 Ch. App. 294; 2 Pom. Eq. Juris. § 805; *Leach* v. *Forbes*, 11 Gray, 586. If the court has properly interpreted the family agreement, there can be no question that the plaintiff is by it debarred from maintaining his present suit. It was the *duty* of the court to find the intent of the parties. *Sherwood* v. *Whiting*, 54 Conn. 333; *Brown* v. *Slater*, 16 id. 195; *Cake* v. *Peet*, 49 id. 504; *Mobile* v. *Jurey*, 111 U. S. 592; *Barreda* v. *Silsher*, 21 How. 146, 161; *Nash* v. *Towne*, 5 Wall. 687; *Canal Co.* v. *Hill*, 15 id. 94.

ANDREWS, C. J. There is quite a long list of reasons of appeal, but it will not be necessary to consider them in detail. They are only an expansion of the claims made by the plaintiff at the trial, and these may all be disposed of by considering a few general propositions.

If the Act of 1889 was constitutional, especially that part of it which is relied on to support the order made by the judge of probate in Stamford on the 18th day of December, 1893, and if the law is so that the proceeding was pending, at the time that order was made, and the order was not void on its face, and if there was no error in the rulings on the evidence, or if the causes of action were discharged by the "family agreement," then there is no material error on which the appellant is entitled to have a new trial. Everything else is included in the finding of facts.

At its January session, 1889, the legislature passed "An

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Act concerning Insane Persons "(Public Acts of 1889, p. 88), which enacted that "any judge of a probate court, within his probate district, shall have power to commit any insane person, residing in said district to an asylum in this State, in the manner hereinafter provided;" and that "except when otherwise specially provided by law, no person shall be committed or admitted to an asylum without an order signed by a judge of probate, as hereinafter provided." The Act then proceeded to details, and enacted that "whenever any person in this State shall be insane, or shall be supposed to be insane, any person may make complaint in writing to any judge of probate, within whose district the person complained of shall reside, alleging that such person is insane and is a fit subject to be confined in an asylum, and when any insane person, who ought to be confined, shall go at large in any town, any person may, and the selectmen thereof shall, make a like complaint to the judge of probate, within whose district such town is included. After receiving said complaint, the judge of probate to whom it is made shall forthwith appoint a time, not later than ten days after the receipt of said complaint, and a place within said district, for a hearing upon said complaint, and shall cause reasonable notice thereof to be given," etc. The Act also specifies many other details to be observed by the judge of probate in respect to such hearing: for adjournments, for the certificate of physicians, and what shall be done in case the person complained of is found to be insane; and in its sixth section says: "Pending the proceedings for a hearing and examination, said judge may make and enforce such reasonable orders for the care and custody of the person complained of, as said judge shall deem suitable and proper."

The complaint made to the judge of probate for the district of Stamford concerning the plaintiff, was made under this legislation and the proceedings were pursuant to its provisions. There is a general claim by the plaintiff's counsel that the whole Act is unconstitutional. It is, however, so obviously within the power of the legislature to make provisions for insane persons, and for their commitment to and

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confinement in an asylum for treatment and care, that we suppose counsel intend to attack this Act only so far as the provision respecting the care and custody of the person complained of, pending the proceedings, is an essential feature of it. It is strenuously insisted that so much of the Act as is relied on to justify the order given to Bolster and Schock, is unconstitutional, for the reason that it may, as in this case it is claimed that it did, deprive a person of his liberty without due course of law. That constitutional provision is invoked, which says that no person shall be deprived of his life, his liberty or his property, without due course of law. Nothing can well be dearer to the law than the right of each person to his life, his liberty and his property. For more than six hundred years the law has been zealous and astute to protect these rights. The words of Magna Charta, which declare that every person shall be protected in the enjoyment of his life, his liberty and his property, except as they might be declared to be forfeited by the judgment of his peers or the law of the land, furnish the rule. In some form of words this principle is now found in every one of the American constitutions. No one does or can deny its binding force. But constitutional provisions, however often repeated, do not give to any one an absolute estate in even these high privileges, which he can enjoy to the exclusion of others. These privileges must be enjoyed with just limitations,—with such limitations as are necessary to make their enjoyment by each consistent with the like enjoyment by all. The right of all is superior to the right of any one. These limitations are not deprivations of the right. They are regulations; so that no one person can insist on a right to the enjoyment of any one of these privileges, to the exclusion or the infringement of the right of any other person to the like enjoyment. The taking of life itself by a private person and without warrant may sometimes be justified. One may lawfully kill an assailant if necessary to save his own life or the life of his wife or children. *Morris* v. *Platt*, 32 Conn. 75. A burglar who in the night season is attempting to break into a dwelling, may be killed if his attempt can be frustrated in no

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other way. A husband or father who finds one attempting to commit rape on his wife or daughter may lawfully kill him to prevent the crime. 4 Bla. Comm. 179, 180. Examples of this sort of regulation are more often found in the laws and ordinances which apply to property, than elsewhere. Among them are the very many statutes and regulations which concern the use of property. The constitutional provision just stated has never been regarded as incompatible with the principle, equally vital—being essential to the permanent safety of society—that all property is held subject to the power of the State to regulate the use by the owner, when that use is found to be injurious to the community. *Mugler* v. *Kansas*, 123 U. S. 623, 665; *Beer Company* v. *Massachusetts*, 97 id. 25, 32; *Commonwealth* v. *Alger*, 7 Cush. 53. There are many cases in which the rights to the use of property must be exercised subservient to the public welfare. The maxim of the law is that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. Thus, if a common highway be out of repair, a passenger may lawfully go through an adjoining private enclosure. So it is lawful to raze houses to the ground to prevent the spreading of a conflagration, without being responsible in trespass or otherwise. *Russell* v. *Mayor*, 2 Denio, 461. There are many other like conditions. See 12 Coke, 13, 63; *Maleverer* v. *Spinke*, 1 Dyer, 36 *b*; Vin. Abr., Title "Necessity"; 2 Kent's Comm. 338; *Governor* v. *Meredith*, 4 Term Rep. 794, 797; *Respublica* v. *Sparhawk*, 1 Dal. 357, 363; *Vanderbilt* v. *Adams*, 7 Cowen, 349; Cooley on Const. Lim. 739. So, too, public nuisances may be abated by anyone who is injured thereby. *Van Wormer* v. *Mayor*, 15 Wend. 262; Wood, Nuis. 768. To the same rule the vindication of our law that the property of a defendant in a civil suit may be attached on *mesne* process and held till final judgment, must be referred. The various rules and statutes authorizing these limitations to the rights of property owners have always been regarded as police regulations, although they curtail the owner's use in some degree, and not unconstitutionally.

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The right to personal liberty ought, perhaps, to be regarded as on a higher plane than the right of property; but the constitutional protection to the one is precisely the same as to the other. The right to enjoy liberty is always limited by the duty which requires every one to use his liberty in such a way as not to be detrimental to the public. There are many cases in which a man may be restrained of his liberty by any one, and without warrant. "It is justifiable if a man hold another to restrain him from mischief." Com. Dig., "Battery" A. In *Glever* v. *Hynde*, 1 Mod. Rep. 168, a private person without a warrant removed one who was disturbing a funeral service. His action was justified. In *Hall* v. *Flanner*, 1 Levinz, 196, the church warden removed the hat from the head of one who refused to uncover his head during divine service in a church on a Sunday. This was held to be justifiable. In *Handcock* v. *Baker*, 2 B. & P. 260, the defendant broke and entered into the house of the plaintiff to prevent him from murdering his wife. This was justified. A person dwelling in a house infected by any contagious disease may be required by a constable to keep within his house. And if he disregard such command it may be enforced by a watchman; and if any hurt ensue by such enforcement the watchmen are thereby indemnified. 4 Bla. Comm. 161. The health officer of a city may confine one who has been exposed to the small pox, to prevent the spread of that disease. *Harrison* v. *Mayor*, 1 Gill, 264. "A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself, or any other person." Bac. Abr., "Trespass" D, *573. "It is universally conceded that every man may for his own protection restrain the violence of a lunatic; and any person may, at least temporarily, place any lunatic under personal restraint whose going at large is dangerous to himself, or others." Tiedeman on Police Powers, 108. Clearly this may be done as preliminary to the institution of judicial proceedings by which a judgment for a permanent confinement may be obtained. 6 South. L. Rev. N. S. 568; 3 Amer. Law Rev. 193; *Colby* v. *Jackson*, 12 N. H. 526;

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Davis v. *Merrill*, 47 id. 208; *Keleher* v. *Putnam*, 60 id. 30; *Williams* v. *Williams*, 4 Thomp. & C. (N. Y.) 251; *Look* v. *Dean*, 108 Mass. 116, 120; *Doyle, Petitioner*, 16 R. I. 537, 538; Law. Ri. & Rem., § 1066; 11 Amer. & Eng. Ency. of Law, 112; Cooley on Torts, 179; *Commonwealth ex rel. Draper* v. *Kirkbride*, 3 Brew. (Pa.) 393; *Van Deusen* v. *Newcomer*, 40 Mich. 90.

"The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. In the delirium of fever, or in the case of a person seized with a fit, unless this was the law, no one could be restrained against his will. And the necessity which creates the law, creates the limitation of the law. In the case of an application to have a guardian appointed over the person and estate of an insane person, under the statute, some time must necessarily elapse before the appointment can be made, and during that time restraint may be necessary. If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained, in his own home, he may be restrained in a suitable asylum, under the same limitations and rules. Private institutions for the insane have been in use, and sanctioned by the courts; not established by any positive law, but by the great law of necessity and humanity. Their existence was known and acknowledged at the time the Constitution was adopted. The provisions of the Constitution in relation to this subject must be taken with such limitations, and must bear such construction, as arise out of the circumstances of the case." CHIEF JUSTICE SHAW, in the case of *In re Josiah Oakes*, 8 Law Reporter, 122, 124.

Limitations to the use of property, or to the personal liberty of another, in the different classes of cases to which the instances we have cited may be referred, have always been holden not to infringe the constitutional provision now invoked. In none of them is there any deprivation of the right, but only its just regulation. These limitations serve to pre-

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vent such a use by one of his property, or of his liberty, as takes away from others their equal right to the use of their own. One who is prevented from injuring another cannot justly assert that he has himself been deprived of any right. An insane person whose going at large is dangerous to others, or to himself, and who is restrained, cannot maintain that he has been deprived of any right, or that he has suffered any injury. In most of the cases cited, the act placing a restriction upon the liberty of another was by a private person, and the act was held to be justified. But a private person can act only in an emergency, and then only at his peril: the peril of being unable to prove the existence of the emergency which is his justification. Restrictive conditions of this kind upon personal liberty, or upon the use of property, are sometimes absolutely necessary to the safety of all. A wise administration of government does not leave it to private persons to decide when these restrictions shall be exercised. Private persons may not be willing to take the hazard. And so statutes are passed which directly name or authorize a municipal board to appoint some one to judge of the emergency and direct the performance of those acts which any individual might do at his peril without any statute. Such an one is the agent of the law and incurs no personal liability. Statutes of this kind exist in many States and have been upheld, so far as we know, without exception. *Raymond* v. *Fish*, 51 Conn. 80; *Dunham* v. *New Britain*, 55 id. 378; *Russell* v. *Mayor*, 2 Denio, 461; *Van Wormer* v. *Mayor*, 15 Wend. 262; *Coe* v. *Schultz*, 47 Barb. 64; *Taunton* v. *Taylor*, 116 Mass. 254; *Train* v. *Boston Disinfecting Co.*, 144 id. 523; *Ex parte Shrader*, 33 Cal. 279; *Harrison* v. *Mayor*, 1 Gill, 264; Cooley, Const. Lim. 720, 721.

That part of the sixth section of the Act of 1889 under which the judge of probate acted, is a statute of this kind. It named the judge of probate in each district as the agent of the law, to decide whether such conditions existed as made it necessary to confine a person supposed to be insane, for a temporary period. It does not violate any constitu-

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tional provision. It is clearly within the police power of the State.

The statute authorizes the judge to make reasonable orders for the custody of the person complained of, "pending the proceedings for a hearing and examination." If we should assume that this language did not authorize the order made on the 18th of December, upon the mere presentation of the complaint, it clearly did authorize the order as modified and confirmed on the 22d of that month, after a full hearing of all parties; the action of the judge upon the hearing was, at least, equivalent, so far as concerns the defendants Bolster and Schock, to the order of that day. We might, therefore, deem it immaterial to pass upon the validity of the order when first issued; not because it could only affect the claim for damages for the unlawful custody from the 18th to the 21st, but because the statute under which it arises has since been altered, and the claim for damages, if valid, has been discharged by the family agreement.

It is further claimed that the order to Bolster and Schock was void, for the reason that no proceeding for a hearing was pending at the time it was made. The "proceeding" was the application to the Court of Probate to have Mr. Porter declared insane and a fit person to be confined in some suitable asylum. This application was made to the court on the 18th day of December, 1893. With this application there was also presented to the court the affidavit of Dr. Geib, that in his opinion Mr. Porter was insane and liable at any time to do injury to himself or others. The Court of Probate thereupon made an order fixing the time for a hearing on the application, together with an order of notice to be given to Mr. Porter; and immediately thereafter, and before the same was served on Mr. Porter, issued the said order to Bolster and Schock. It appears that Bolster and Schock did not attempt to enter upon their duties under the said order to them, until after service of the said application and order of notice had been made on Mr. Porter; so that the "proceeding for a hearing" was pending at all times while they were exercising any care or control

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of the plaintiff. But the argument is that the said order for care and control was void, for the reason that the proceeding was not pending at the moment that order was made; service on Mr. Porter not then having been made. The argument depends on the case of *Jencks* v. *Phelps*, 4 Conn. 149, and the several cases in later reports which follow that one. It was held in that case that an "action" was not commenced till service had been made on the defendant. It was said by CHIEF JUSTICE MARSHALL in *Cohens* v. *Virginia*, 6 Wheat. 264, 407, that an action or suit is the prosecution of some demand in a court of justice. An "action," then, requires two parties: one who prosecutes the demand, and the other against whom the demand is prosecuted, and something sought to be obtained by the former of the latter. In this sense it is no more than just that an action shall not be deemed to be commenced so as to affect the defendant, until service has been made upon him. This is what was done in *Jencks* v. *Phelps*. It seems to us that the proceeding before the Court of Probate in the district of Stamford on the 18th day of December, 1893, was not an action in the sense in which that word was there used, and that the rule of *Jencks* v. *Phelps* does not apply. There were no parties; there was no demand; nothing sought to be recovered by one against another. It is obvious that the definition of an action given by CHIEF JUSTICE MARSHALL does not include, and was not intended to include, proceedings or actions *in rem*, nor proceedings in the nature of an inquest of office, and other like proceedings. By the said Act of 1889 the judge of probate was made an agent of the law to decide whether or not a person complained of was insane and ought to be committed to an asylum. The judge was to act on the complaint in writing of any person; but the person complaining did not thereby become a party to the proceeding. The statute requires the judge of probate to give notice of the time and place of hearing to the person complaining, as much as it does to the party complained of. At no time in the progress of the inquiry is there an "action" pending in the court, nor are there any "parties," in the sense that these words are

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used in the case of *Jencks* v. *Phelps*. The proceeding was the inquiry by the court as to the sanity or insanity of the person complained of. It was an inquest of insanity. It was in the nature of a police regulation for the care and restraint of a person insane, or supposed to be insane. The proceeding was commenced when the court received the written complaint. So far as the Court of Probate was concerned, the proceeding was then pending. Any proceeding once commenced in any court in the regular way is pending in the court until it is in some way terminated. Webster's Dict. Until it is terminated, the proceeding is in suspense, it is depending. *Wentworth* v. *Farmington*, 48 N. H. 207; *Littlefield* v. *Delaware & H. C. Co.*, 3 Cliff. 371. Our own case of *Huntington* v. *McMahon*, 48 Conn. 174, shows clearly what the term "pending" means when applied to a court. Complaint had been made to a justice of the peace in the town of Winchester, for the condemnation of certain liquors. The liquors had been seized, notice was given, and a hearing was had before the justice, at which certain parties appeared who claimed to be the owners of the liquors. The justice condemned the liquors to be destroyed. The owners took an appeal to the District Court, and the liquors were committed to the keeping of a person named by the justice. The next day, or within a day or two, the owners brought replevin for the liquors and took them out of the possession of the person so named as the keeper. The case cited was an application to the said District Court by the State's Attorney, that all the persons concerned in the action for replevin be punished for contempt of that court. On the hearing of the contempt proceedings, one claim made by the parties was that there could be no contempt of the District Court, for the reason that the appeal was not pending in that court at the time the replevin was served. This court held that the appeal was pending in the District Court as soon as the appeal was regularly taken from and allowed by the justice court, although it was long before the return day to the District Court, and although it appeared that the appeal papers had not been filed with the clerk of that court, and that they had not ever

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been made out by the justice; and that the bringing and serving of replevin was a contempt of the District Court. We are of the opinion that the proceeding for a hearing was pending at the time the order to Bolster and Schock was issued.

The plaintiff argues that the order given by the judge of probate to Bolster and Schock was void on its face, and cites largely from authorities to sustain his claims. We are not able to agree with the plaintiff. It seems to us that he misjudges the character of that order. It is not a judgment. It is a temporary order, provisional, issued only as a precaution to provide against an emergency deemed liable to arise; an order in its nature interlocutory, rather than final. It is a part of the procedure and does not enter into the judgment or decree. It is not an adjudication. It is true that this order does not recite the affidavit of Dr. Geib, nor does it recite the fact that proceedings for a hearing as to the sanity of Mr. Porter were then pending. But the Superior Court could not shut from its eyes, nor can this court, the fact, which the record of the Probate Court discloses, that that court had that affidavit before it at the time this order was issued, and acted on it; nor that the proceedings for the hearing were at that time actually pending. To be sure, the order committed the plaintiff to the care and custody of the persons named. But it was not an order of commitment in execution, and therefore was not to be construed with the same strictness as are final orders. *The King* v. *Gourlay*, 7 Barn. & Cress. 669. It was not void. In the case of *Van Wormer* v. *Mayor*, 15 Wend. 262, an order was made by the board of health of the city of Albany declaring certain premises to be a nuisance and ordering the same to be abated, because of the Asiatic cholera then prevailing in the city; and thereupon the mayor pulled the house down. The order was sustained, although it did not appear that it had ever been reduced to writing, or recorded, except by way of recital in an ordinance by the board.

During the trial the plaintiff offered evidence of certain acts done by one Thoms, on the ground that Thoms had

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been deputed by Bolster to do those acts. The defendant objected to this evidence, for the reason that the complaint did not charge the defendants with doing anything by their agent. The court sustained the objection. This ruling was in accordance with the rules established under the Practice Act. Practice Book, p. 14, Rule III, § 1.

The Rev. Mr. Scoville testified that the plaintiff, within a year next before he was placed in custody, read a paper on John Calvin before a literary club in the city of Stamford, and that the paper "was considered by the members of the club as one of the strongest papers they had had." The defendants asked that this evidence be stricken out; and the court so ordered. We think the evidence was rightly stricken out. It was hearsay.

Mr. Merritt testified concerning his action in making the complaint to the Court of Probate, and in reply to a question by Mr. Fessenden, who was his counsel in this action, said: "I laid the facts before you, as my counsel, and before Dr. Geib, at your suggestion, as a competent medical man, and as the family physician. Since that time I have done absolutely nothing except as you directed me. I have been a mere instrument since that. In fact, I was a mere instrument before." Mr. Fessenden then asked this question: "Did you, in any way, directly or indirectly, instruct me as to the course of procedure, or any step I have taken in it, or as to any advice of counsel I have given in the matter?" The plaintiff objected to this question, but the court admitted it, and the witness answered: "I never did." This evidence was admissible. As Mr. Merritt was charged with acting maliciously in making this complaint to the Court of Probate, he had the right to show that he acted on the advice of counsel.

Counsel for the plaintiff asked of an expert witness, one Dr. Cowles, a hypothetical question. It was conceded, and the fact was so, that it involved assumptions concerning which no evidence whatever had been offered. The court excluded the question, for the reason that a foundation for it had not been laid; and, upon the offer of counsel to sub-

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sequently present such evidence, decided not to admit the question until the basis for it had been laid. This ruling was no more than an exercise by the court of its discretion as to the order in which evidence should be put in. It is not a ground of error.

One part of the defendants' answer is a discharge of all the causes of action alleged in the complaint, by the agreement of the parties. This defense sets up the agreement called the "family agreement." After stating the purpose for which that agreement was entered into, its execution and delivery, and setting it forth in full as a part of the defense, by making it an exhibit, and alleging that the defendants had fully kept and performed all their part of said agreement, this defense concludes in this way: "And the defendants say, upon the facts aforesaid, that by said agreements and the proceedings thereunder, and by the performance by the defendants of the provisions and conditions thereof on their part to be performed, and by said acts of the defendants, the subject-matter of the present suit, and the plaintiff's claims or alleged rights of action described in plaintiff's complaint, and all of the controversies, questions and claims between the plaintiff and the defendants, were fully and finally adjusted, settled, satisfied and ended."

The plaintiff in his reply admits the execution and delivery of the said agreement, and substantially admits the performance by the defendants of their part thereof; but asserts that "the execution of the said paper, by the plaintiff, was procured, induced and compelled under the circumstances, and by the false imprisonment and duress (set forth in the various paragraphs of the complaint), and by the conspiracy, malicious arrest, fraud and duress" therein stated. To this replication the defendants rejoined by a denial.

The issue so formed, as were all the other issues in the case, was found in favor of the defendants. The finding of facts on this part of the case is as explicit and clear as language can make it. The court says: "It was understood, intended and agreed by all the parties to said negotiation and settlement, and to the said family agreement, that the same should accomplish a full and final settlement and ad-

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justment of all the existing claims, questions and differences between the parties thereto, and of all the legal proceedings then pending, and the subject-matter thereof, and of all the matters arising out of the proceedings instituted by Mr. Merritt—the said complaint and application made to the judge of probate on the 18th day of December, 1893,—in favor of, or against, whatever party, and including all the matters covered by the plantiff's complaint, all of which antedated the said settlement."

We are not able to see why this finding of the issue and of the facts is not a complete and absolute bar to the plaintiff's entire action. Had he desired to make the claim that the "family agreement" did not of itself operate to bar his action, because its terms do not warrant such a construction, and that the alleged intention that it should so operate was unavailing because not so expressed in it, he should have demurred.

So far as the plea of duress is concerned the plaintiff was never in such a situation that it was legally impossible for him to make an agreement which would be binding on him. All those circumstances with which he was surrounded, so graphically and impressively set forth by his counsel in their brief—which constitute the duress and imprisonment complained of, and which would be likely to affect his freedom of action—were for the consideration of the trial court. From the finding of facts we know that the trial court did consider them, and having so considered them has found that "said family agreement was executed by the plaintiff freely and voluntarily, and under the advice of his friends and counsel, and without any influence having been brought to bear upon him by any person or persons save only his friends and counsel, who, acting solely in his interests, advised and urged him to its execution."

It seems to us that the plaintiff is bound by the family agreement; that he ought to keep it, and that he has no right of action for anything alleged in the present complaint.

There is no error.

In this opinion the other judges concurred.

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THE STATE *vs.* MATTHEW C. HANLEY.

First Judicial District, Hartford, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The charge of embezzling "moneys" under § 1580 of the General Statutes, cannot be supported by proof of embezzling a chose in action.

The defendant was charged with receiving, as agent, $63 in money and embezzling the same. The proof showed that he received an order for the payment of $230, agreeing to collect the same, to retain $167 of the proceeds in discharge of a debt due himself, and appropriate the balance as his principal directed, and that before the order was payable he indorsed it over to another in payment of his own debt. *Held* that a charge to the jury that such indorsement was an appropriation of the money of his principal, as charged in the complaint, was erroneous.

The trial court may properly refuse to charge the jury in respect to matters which are not pertinent to the case.

The drawer of the order testified that the defendant agreed to pay a part of the proceeds when collected, to one *S*, to whom the drawer was indebted. *Held* that *S* might testify, in corroboration of this evidence, that the defendant had afterwards said to him that he, the defendant, would pay his (*S's*) claim.

[Argued October 5th, 1897—decided January 21st, 1898.]

INFORMATION for embezzlement, brought to the Superior Court in Litchfield County and tried to the jury before *Ralph Wheeler, J.;* verdict and judgment of guilty, and appeal by the accused for alleged errors in the rulings and charge of the court. *Error and new trial granted.*

The accused also moved for a new trial for a verdict against evidence, which the trial court denied; and thereupon a similar motion was made and addressed to this court, under Chap. 51 of the Public Acts of 1893. *Motion for a new trial upon this ground denied.*

The second count in the information, upon which the defendant was convicted, was as follows: "And said attorney further informs and gives this honorable court to understand. that on the 16th day of December, 1895, at Thomaston aforesaid, the said Matthew C. Hanley was the agent of said Henry A. Episcopo to collect and receive from the Ab-

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bott Brothers Company of Waterbury, Connecticut, the sum of two hundred and thirty dollars, which sum was then due and belonging to said Henry A. Episcopo, and to pay from and out of said sum so collected and received as agent aforesaid, the sum of one hundred and sixty-seven dollars, then and there agreed to be due said Hanley from said Episcopo, and to turn over and deliver to the said Henry A. Episcopo, and for and in his behalf, the balance of said sum, viz: sixty-three dollars; and as such agent the said Matthew C. Hanley did then and there receive and take into his possession said sum of sixty-three dollars, for and in behalf of said Episcopo, and then and there with force and arms, did fraudulently, feloniously, and with intent to defraud the said Henry A. Episcopo, take, purloin, secrete and appropriate to his own use said sum of sixty-three dollars, against the peace and contrary to the form of the statute in such case provided."

The finding of facts was as follows: On the trial of the above entitled action, the State claimed to have proved: "1. That for two or three years prior to Dec. 6, 1895, the accused, Matthew C. Hanley, carried on the liquor business in Thomaston. 2. That during this time one Henry A. Episcopo was the interpreter and purchasing agent for certain Italian laborers then at work in said Thomaston, and as such purchased from the said Matthew C. Hanley intoxicating liquors and cigars. 3. That on Dec. 6, 1895, said Episcopo was indebted for goods purchased from the said Hanley, in the sum of $167, as settled and agreed upon by said Episcopo and Hanley. 4. That on December 6, 1895, the Abbott Bros. Co. of Waterbury, Conn., were indebted to the said Episcopo in the sum of $230. 5. That on said Dec. 6, 1895, the said Episcopo delivered to the said Hanley a written order on said Abbott Bros. Co. for the sum of $230, which order had been duly accepted by said Abbott Bros. Co. to be paid on the 20th of Dec. 1895; the said Episcopo delivered said order to said Hanley upon agreement that the said Hanley should collect said sum of $230, when due and payable, and pay therefrom his own claim of $167 against

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said Episcopo, and should pay the remaining $63, belonging to said Episcopo, as follows, viz.: the sum of $11 or $12, to one ——— Smith of Thomaston, and the sum of $15 to one ——— Welton of said Thomaston, to whom said Episcopo was severally indebted in said amounts, and remit the balance of said sum of $63, to said Episcopo. 6. That said Hanley assigned, transferred and delivered said order on the Abbott Bros. Co., to one Robert Lowe of Waterbury, to whom it was paid by said Company. It appeared from the testimony of Hanley (and no other evidence was offered on this subject), that said order was assigned and transferred to said Lowe by said Hanley to pay and satisfy a bill that Hanley owed said Lowe. 7. In corroboration of the statement of said Episcopo, the State offered the testimony of one ——— Smith, who was the same Smith alluded to in paragraph 5 as the creditor of Episcopo, that in the latter part of December, 1895, Hanley told said Smith that he would pay his bill against Episcopo. To this evidence Hanley objected, on the ground that it was immaterial, improper and irrevelant, and that the statement was made after the offense was claimed to have been committed. The court overruled the objection, admitted the testimony, and Hanley excepted. 8. The said Hanley admitted that he received said order on Abbott Bros. Co., but testified that on the 6th or 7th day of December, 1895, he paid to said Episcopo the sum of $65, as and for the difference between the amount of said order and Episcopo's indebtedness to him. 9. The said Hanley made the following requests to the court to charge the jury, to wit: '*First.* That even if it was proved that the defendant delivered the order on the Abbott Company to the attorney Lowe, and Lowe collected the same and appropriated the proceeds thereof to the payment of the defendant's debt with the consent of the defendant, that this would not constitute embezzlement under our statute. *Second.* That as part of this money for which this order was given belonged to the defendant; and as this part had not been separated at any time from the part which belonged to Episcopo, that under such circumstances no part of the

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money in question was the property of another, within the meaning of our statute against embezzlement.' The court did not charge the jury as requested, but did charge them as follows: 'And the attorney says that from the evidence, the accused undoubtedly was the agent—special agent—of Episcopo for the collection of that money, and for the disposal of it in the manner agreed upon between them. And the State goes further, and says that being thus the agent of his principal, he endorsed over this order on Abbott Brothers to a Mr. Lowe—if that was the name—to pay Hanley's indebtedness to Lowe; and that the full amount of money for which the order was drawn upon Abbott Brothers, was paid by Abbott Brothers to Mr. Lowe. Now I have to say to you, that if the accused did receive this order for the amount named, and if by their agreement he was to dispose of it as Mr. Episcopo says, and, if in the transaction of this business, instead of collecting the money and disposing of it as agreed, he endorsed that order over to his own creditor, and thus paid his own debts with the money, that would be such an appropriation as would be contemplated by this statute. If he thus appropriated, while agent, the money of his principal, with the intent to defraud that principal, then the full offense was committed. Of course, to be guilty in this transaction you must find beyond a reasonable doubt that there was not only an agency and the appropriation of the money, but that the accused intended at the time of the appropriation to defraud his principal, and these are the questions presented to you upon the evidence.' To the refusal to charge as requested, and to the charge as actually delivered by the court, the defendant duly excepted. The jury returned a verdict of guilty, which was accepted by the court, and the defendant appealed."

John O'Neill, for the appellant (the accused).

The defendant requested the court to charge that as part of the money for which the order was given belonged to the accused, and this part had not been separated from the part which belonged to Episcopo, no part of the money in ques-

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tion was the property of "another" within the meaning of our statute relating to embezzlement. The court did not charge as requested, but did charge that the accused would be guilty under such circumstances. The court erred in its charge on this subject, and also in refusing to charge as requested. *State* v. *Kent*, 22 Minn. 41; *Holmes Case*, 2 Lewin, 256; 2 Archb. Crim. Pr. & Pl., 569, note; 2 Bish. Cr. Law, 335 note 3, 355, 356; *Rex* v. *Hoggins*, Russ. & Ry. 145; *Com.* v. *Stearns*, 2 Metc. 343; *Com.* v. *Libbey*, 11 id. 64; *Com.* v. *Foster*, 107 Mass. 221.

Donald T. Warner, State's Attorney, with whom was *James Huntington*, for the appellee (the State).

If the accused had personally received the $230 in actual cash, his own part would have come to him mingled with Episcopo's. If he intended to embezzle the $63, his separating of the funds into two parts, his own $167 and Episcopo's $63, and applying his own share of the avails to pay his own debt and then converting Episcopo's share to his own use, would not make his guilt any more real or plain, than to apply the whole order to discharge his own indebtedness. With this intent, he commits the crime, whether he does at the same time some rightful thing or not. The defendant's theory is that because some part of the order belonged to Hanley, his application of the whole order, and the part which confessedly was not his, would not be embezzlement. But whatever the law may be in case of a person dealing as a broker or commission agent, with authority to mingle funds in the absence of any special bargain, in this case, where the trust was explicit and authority express to pay the $63 remaining after his own debt was liquidated, for and in behalf of Episcopo, the accused by converting the $63 was guilty of embezzlement. 2 Bish. Cr. Law, § 371.

HAMERSLEY, J. Theft, as distinguished from embezzlement, is taking property of another from the possession of the owner, with intent to defraud. Embezzlement, as distinguished from theft, is taking property of another in the

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possession of the accused, with intent to defraud. The crimes are essentially the same; but most unfortunately are, for the purposes of prosecution, entirely distinct. The one demands, as an essential element a trespass, a breach of technical possession; the other cannot be committed unless the element of trespass or breach of technical possession is absent. The former is a crime at common law; the latter is a statutory offense.

In this State embezzlement was not made a crime until 1829. It was not mentioned in the Digest of JUDGE SWIFT, because it was not a crime at the time he wrote. In the editions published since his death it is not mentioned, except in a single brief form. We have never had occasion to discuss the statutes which, since 1829, have created the different offenses classed as embezzlement. There are only three reported cases under the statutes, and these involve a very slight consideration of the nature of the crime. The offenses, however, are governed by the rules common to all statutory offenses, and these rules are well settled.

The case before us is a prosecution under § 1580 of the General Statutes, which provides that "any agent of any private individual, who shall take, purloin, secrete, or in any way appropriate to his own use, or to the use of others, any of the goods, moneys, or choses in action, belonging to such individual, with intent to defraud another," shall be imprisoned. The conditions of the offense under this provision, as charged in the complaint, are: an agency within the meaning of the statute; specific property the subject of the crime, *i. e.*, things that are within the meaning of the statute, either goods, moneys, or choses in action; receipt of the property specified, by an agent on behalf of the person who is the principal; ownership by the principal of the property so received by the agent—an ownership, however, unaccompanied by the technical possession of the principal essential to the crime of theft; and an appropriation of the property by the agent with intent to defraud.

No claim is made that these elements of the crime are not properly alleged. The property which is the subject of the

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crime is described as "the sum of sixty-three dollars." This is equivalent to "sixty-three dollars in money," or "certain money of the amount of sixty-three dollars;" or, as stated in the form in Swift, "ten eagles." The complaint does not charge the embezzlement of any goods, nor of any chose in action; unless it charges the embezzlement of "moneys," no crime is charged. The complaint, therefore, alleges that the accused, Hanley, being the agent for that purpose of one Episcopo, did receive and take into his possession for said Episcopo, certain moneys of the amount of sixty-three dollars, and with intent to defraud said Episcopo did appropriate to his own use said moneys belonging to said Episcopo.

It appears from the record that the trial disclosed, as conceded, the following facts: On December 6th the firm of Abbott Brothers owed Episcopo $230, and Episcopo owed Hanley $167; Episcopo drew an order on Abbott Brothers for $230, in favor of Hanley, which order was accepted by Abbott Brothers "payable December 18th," and, so accepted, was received by Episcopo in payment of the debt due him. On December 6th or 7th Episcopo delivered the order to Hanley. On December 18th, one Lowe presented the order to Abbott Brothers, who paid the amount ($230) to said Lowe.

The State claimed also to have proved that at the time of the delivery of the order to Hanley he agreed, as agent of Episcopo, to collect the order when it became due, to pay from the amount collected his own claim of $167, to pay $11 or $12 to one Smith, and $15 to one Welton (to whom said Episcopo was severally indebted in said amounts), and to remit the balance to said Episcopo; and that Hanley assigned and delivered said order to Lowe to whom it was paid.

The defendant claimed to have proved that no agreement of agency was made by him; that shortly after the delivery of the order he paid Episcopo in cash the difference between the amount of the order and the amount of Episcopo's debt to him; and that he transferred and delivered the order to Lowe in payment of a bill he owed Lowe.

The controlling fact to be found from conflicting evidence was the fact of agency. As to this the testimony was in

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direct conflict, and undoubtedly the attention of the jury was centered on this contested fact. But there was in the case the further fact, equally essential to guilt, that Hanley in pursuance of the agency did, as charged in the information, "receive and take into his possession" and fraudulently appropriate to his own use, money belonging to Episcopo. This fact was not directly the subject of conflicting testimony, but had to be inferred from other facts; and an accurate statement by the court of the law applicable to the facts, was essential to its determination by the jury. It is in the statement of this law that the court below has erred. The accused requested the court to charge that "even if it was proved that the defendant delivered the order on the Abbott Company to attorney Lowe, and Lowe collected the same and appropriated the proceeds thereof to the payment of the defendant's debts with the consent of the defendant, that this would not constitute embezzlement under our statute." The request does not accurately express the essential point of law the accused was entitled to have stated. For this reason, perhaps, the appeal does not specify as error the refusal of the court to charge as requested; it does, however, assign as error, in the fifth reason of appeal, the charge as given. The court tells the jury, in stating to them the law applicable to the facts as claimed by the parties, that if the accused received the order upon an agreement of agency as claimed by the State, and if "instead of collecting the money and disposing of it as agreed, he endorsed that order over to his own creditor, and thus paid his own debts with the money, that would be such an appropriation as would be contemplated by this statute;" meaning, of course, that it would be an appropriation of moneys received by Hanley and belonging to Episcopo.

The error here is plain. Whether the sale of that order to a *bona fide* purchaser, under the circumstances detailed, would or would not be the embezzlement of a chose in action, within the meaning of the statute, is not the question; the only question is, would it be the embezzlement of money, the property of Episcopo? Until that order became due, Episcopo owned no money in the hands of Abbott Bros., or

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of Hanley; there was no money which could be the subject of the crime. Abbott Bros. might pay the order with money, and if that money came into the possession of Hanley he might embezzle it. But he could not embezzle it before payment and possession; because the existence of money as the subject of the crime, and its possession by the agent, are essential elements of the crime as alleged. If the charge of the court is correct, then the crime of embezzling the money of Episcopo was complete when Hanley transferred the order to Lowe in satisfaction of an existing debt. This cannot be true, unless the charge of embezzling "moneys" may be sustained by proving the embezzlement of goods or of choses in action. We deem it clear that this section of the statute defines the subjects of embezzlement substantially as the subjects of theft are defined. Whatever difference there may be between theft and embezzlement in following the identity of articles specified in the indictment, the kind of property which is the subject of the crime charged must in both cases be proved as alleged.

If the indorsement to Lowe was a mere cover, so that Lowe became, not the *bona fide* owner of the chose in action, but only the agent of Hanley to receive the money for him, and Hanley directed the misappropriation of the money so received, then the crime as alleged was complete. It may be possible that the testimony might have justified the jury in finding that Hanley's claim of an assignment or sale to Lowe in satisfaction of a debt, was not true, and that Hanley collected the order and received the money and appropriated it to his own use after it came into his possession. But the court was bound (whether requested to do so or not) to properly submit this question to the jury; and could not take it from them by an instruction that Hanley's sale of the order before it was due, in satisfaction of a debt, was conclusive proof of the allegation that he received into his possession money belonging to Episcopo, and appropriated that money to his own use. The apparent cause of the error lies in the assumption that before the accepted order was due, Episcopo owned "moneys," within the meaning of the stat-

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ute, in the hands of Abbott Brothers; and that these moneys while in the hands of Abbott Brothers were in the possession of the agent Hanley, and were the subject of embezzlement by him as "moneys," under the statute. Possibly the error arose from confounding the relation of agency under § 1580, with the relation of a trustee of an express trust to his trust fund, under § 1579. However that may be, the error was a material one; it might have been and probably was decisive of the question of guilt or innocence of the crime charged.

The other errors assigned furnish no ground for a new trial. Those specified in the first three reasons of appeal relate to the refusal of the court to charge in respect to matters which do not appear to have been pertinent to the complaint and proof. The ruling on evidence specified in the fourth reason was unobjectionable. The 6th reason is too general to be considered.

The motion for a new trial for a verdict against evidence, is denied.

There is error, the judgment of the Superior Court is set aside, and the cause remanded for further proceedings according to law.

In this opinion TORRANCE and BALDWIN, Js., concurred; ANDREWS, C. J., and HALL, J., dissented.

JOHN M. SWEENEY *vs.* DAVID PRATT ET AL.

Third Judicial District, Bridgeport, Oct. Term, 1897. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

An obligee in a bond for a deed, who has paid no portion of the purchase price of the land, has no interest therein which can be levied upon under execution, nor any interest to which a judgment lien can attach.

The parties were at issue as to whether a payment made by the debtor to his creditor was intended to apply to and include a particular

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note. *Held* that a letter written by the creditor to the debtor, at the time of such payment, showing how the money had been applied, was, in connection with the debtor's failure to object to such application, admissible in support of the contention of the creditor.

The knowledge of an attorney, gained in the very business in respect to which he is such attorney, is to be imputed to his client.

An estoppel by conduct always presupposes error on the one side and fault or fraud on the other.

[Submitted on briefs Nov. 23d, 1897—decided Jan. 21st, 1898.]

SUIT to foreclose a mortgage and also a judgment lien, brought to the District Court of Waterbury and tried to the court, *Bradstreet, J.*; facts found and judgment rendered for the plaintiff, and appeal by both parties for alleged errors in the rulings of the court. *No error.*

The complaint alleged that on the first day of August, 1891, the defendants, D. & H. Pratt, made twenty of their promissory notes, each for the sum of two hundred dollars, payable to the order of the Cheshire Manufacturing Company: the first, one year from date, and the other nineteen, one each six months thereafter, with interest at the rate of five per centum per annum payable semi-annually, together with all taxes on said notes laid against said Manufacturing Company or the holders of the notes; that said notes were secured by a mortgage of the tract of land sought to be foreclosed; that thirteen of said notes had been paid in full, and the sum of $117.22 on the fourteenth, so that there was unpaid, in whole or in part, seven of said notes, being those last payable, and amounting in the whole to the sum of $1,282.28; that on May 19th, 1892, the said company was compelled to pay and did pay the sum of $70 taxes on the property mortgaged, which had been laid against the said D. and H. Pratt; that on October 2d, 1896, the said Manufacturing Company duly assigned the said seven unpaid notes and the mortgage securing them, to the plaintiff, and that he was now the actual and *bona fide* owner and holder of the said unpaid notes and said mortgage.

The complaint in a second count prayed for the foreclosure of a judgment lien on the same land.

Curtis Thompson of Bridgeport and Catherine A. Pratt of

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Naugatuck, were made parties defendant, each of whom, it is alleged, had acquired some interest in said land which accrued after the rights of the plaintiff.

The answer of D. & H. Pratt and Catherine A. Pratt, alleged that the said Pratts had, in the land on which the judgment lien was placed, at the date thereof, no such interest as could be taken or affected thereby; that the said company had discharged D. &. H. Pratt from the payment of said taxes, and that sixteen of said notes had been paid in full, and a part of the seventeenth.

The answer of Curtis Thompson alleged that there had been paid the sum of $3,400 on said notes and applied in payment of those which the soonest became due, so that there was at that date due only the sum of $600 of the whole amount of the said notes; that he loaned to the said D. & H. Pratt, on the 28th day of May, 1894, the sum of $570 and took as security therefor a second mortgage on the said tract of land now sought to be foreclosed, in the belief that only $600 was due on the principal of said twenty notes; and that he had no knowledge or suggestion that any more was due.

The trial court denied the prayer of the plaintiff for a foreclosure of the judgment lien; denied the plaintiff's claim to have a foreclosure as to the said sum of $70; found that seven of the said notes were unpaid in whole or in part, and, as the principal sum of these notes was not by their terms due, but only the sum of $315.22 of interest, rendered judgment that unless the defendants paid the said sum so due they should be foreclosed of all right to redeem the said premises. From this judgment both parties appealed.

The additional facts in the case, so far as necessary, are stated in the opinion.

Curtis Thompson and *Edmund Zacher*, for the appellants (defendants).

E. P. Arvine, for the appellant (plaintiff).

ANDREWS, C. J. We think the trial court decided correctly as to the judgment lien. At the time that lien was

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placed on the land, May 28th, 1890, the said D. and H. Pratt had no interest in the land which could have been levied upon under an execution on that judgment. They had only a bond for a deed. They had paid nothing whatever on the notes mentioned in the bond. They had no title to the land; they were not even equitably possessed of any right to have a title. General Statutes, § 3034; *Beardsley* v. *Beecher*, 47 Conn. 408, 412; *Loomis* v. *Knox*, 60 id. 343; *Hobbs* v. *Simmonds*, 61 id. 235.

The trial court has, in effect, found that the Cheshire Manufacturing Company had discharged the said D. and H. Pratt from the payment of the said sum of $70 paid for taxes; and this finding is on evidence to which no objection was made. We think this finding was conclusive.

As respects the twenty notes mentioned in the complaint, the only question was and is, how many of them are unpaid? Are there seven unpaid; or are there only three or four? As to these notes the plaintiff is the assignee of the Cheshire Manufacturing Company. He has just such right in the notes and in the mortgage—neither greater nor less—as that company would have if it was the plaintiff. Indeed, to ascertain the plaintiff's rights in this case, we must inquire what rights of that company were conveyed to the plaintiff by its assignment to him. There is no claim that he has parted with anything since he became the assignee. The right so assigned to the plaintiff will be made to appear by an examination of the several transactions which have been had between the said company and the said D. and H. Pratt, and they are as follows: On the 16th day of August, 1886, the said company gave to the said Pratts a bond for a deed of the land now in question. The condition of this bond was that the said Pratts should pay to said company their sixteen certain notes, each for the sum of $437.50, amounting in the whole to $7,000, and payable as was therein specified. On the same day the said D. and H. Pratt made and delivered to the said company eight other notes, each for the sum of $625, amounting in the whole to $5,000, and secured the payment of said last mentioned notes by a chattel

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mortgage of certain machinery in a factory then occupied by the Pratts in Naugatuck. On the said series of sixteen notes the said Pratts never paid anything, and never had, and were never entitled to have, a deed, by virtue of the said bond for a deed.

In 1891 negotiations were had between the said company and the Pratts, which resulted in a compromise. The said sixteen notes were surrendered, and the company gave a warrantee deed of the land to the Pratts. The Pratts, in payment therefor, made the said twenty notes described in the complaint, and secured the payment thereof by the mortgage now in suit and also by a chattel mortgage on the machinery before mentioned. This machinery was in the factory on the land mortgaged. On the day of , 1892, the factory and machinery were totally destroyed by fire, and some dispute arose as to whom the insurance money should be paid. On the 14th day of May of that year, at a meeting at which the said company was present by its duly appointed officer, and its attorney E. P. Arvine, Esq., and at which the said D. and H. Pratt were present with their attorney, N. R. Bronson, Esq., an agreement was entered into and executed in duplicate, the material parts of which are as follows: "This agreement witnesseth: That whereas said Herbert Pratt and David Pratt are indebted to said Cheshire Manufacturing Company in sundry notes secured by mortgage on real and personal property situated in said Naugatuck; and whereas a certain factory situated in said Naugatuck, being a portion of the real estate upon which the said Cheshire Manufacturing Company held a mortgage securing twenty of said notes, was consumed by fire, and a portion of the machinery likewise mortgaged to said company to secure notes was also destroyed; and whereas said property was insured by policies payable to said Cheshire Manufacturing Company as their interest might appear, and also to the said Pratts; and whereas said losses have been adjusted, and there is due on account of the same on said policies the sum of three thousand four hundred dollars: Now therefore it is agreed that said three thousand four hundred dollars shall be

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immediately paid to said Cheshire Manufacturing Company, to be theirs absolutely, and that if within six months from date hereof the said Pratts shall pay to said company the further sum of six hundred dollars, with interest from date to date of payment, said company shall deliver to said Pratts, or to any person by them requested, all notes which it now holds against said Pratts, and which shall fully discharge and release all claims under said mortgages securing said notes, or any other claims against them; or shall assign and transfer the said interests and said claims against said Pratts, and any securities for said claims, to any person or persons by said Pratts suggested; and that if said Pratts shall fail within six months from date to pay said sum of six hundred dollars, with interest as aforesaid, all the notes held by said Cheshire Manufacturing Company shall be payable according to their tenor, and said sum of three thousand four hundred dollars shall be applied, as on the date of its reception by said company, in discharge of the notes so held by said company as aforesaid that shall be then due and that shall soonest become due, so far as said money shall extend, and the notes so discharged shall be regarded as paid on the date of the payment to said company of said thirty-four hundred dollars."

This agreement was dated May 14th, 1892, and was executed by all said parties. It is conceded and is found that the said Pratts did not within six months after said agreement pay, nor have they at any time since paid, said sum of $600. At that time it was supposed that the sum to be paid on the insurance policies was $3,400. The amount in fact paid was a little less, *viz.* $3,383. At this time there was due from D. and H. Pratt to the said company the said twenty notes mentioned in the complaint, and the sum of $542.82 on the last note of the said series of eight notes dated on the 6th day of August, 1886, and secured by the chattel mortgage; in all twenty-one notes. The last mentioned note was not then in the possession of the said company. It was in the hands of its agents, Porter Bros. & Co., for collection, and was to be recalled from said agents by

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the counsel of the company. The trial court finds that it was agreed between the parties that the amount due by said note should be paid from the insurance money, and the balance applied towards said twenty notes, upon those first to become due, and after said balance had paid as many notes in full as it could, the remainder should be indorsed on the note next to become due; and that the insurance money did pay the said sum of $542.82 and thirteen of the said series of twenty notes dated August 1st, 1891, in full, and $117.72 to be applied on the fourteenth note. A few days after the 14th of May, 1892, counsel for the Cheshire Manufacturing Company recalled the said note from Porter Bros. & Co. and sent it together with the thirteen of said twenty notes, to N. R. Bronson, Esqr., counsel for the said Pratts, in a letter as follows:

"NEW HAVEN, CONN., May 17th, 1892.

"Messrs. TERRY & BRONSON,

"*Gentlemen*: Inclosed you will find the New York note, with statement of Porter Bros., amount due, $542.82. We have received from the insurance companies $3,383, not $3,400—$3,383.00 less $542.82 leaves $2,840.18 towards canceling the notes secured by real estate; that is to say, the 20 notes.

"Thirteen of these notes amount to $2,600.00. Interest to May 14, '92, 6% $122.46. Total $2,722.46. $2,840.18 less $2,722.72, leaving $117.72 to be indorsed on the 14th note.

"I send the old note and the 13 secured by mortgage on real estate, and have indorsed $117.72 on the 14th note.

"Respectfully yours, E. P. ARVINE."

This letter with the notes included was received by Mr. Bronson and by him made known to his clients, the Pratts, or to one of them. Neither Mr. Bronson nor either of the Pratts made any objection to the application of said insurance money which had been made by the Cheshire Manufacturing Company as indicated in said letter, till the trial of this case, a period of nearly five years. On the 21st day of July, 1892, the Cheshire Manufacturing Com-

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pany released the chattel mortgage by which the said series of eight notes had been secured. Of this series the said $542.82 note was the last.

No payment, either of principal or interest, has been made on the said seven notes—the last to become due of the said series of twenty—since the said 14th day of May, 1892. They are all still due and unpaid; and there is interest due from said May 14th, 1892, to April 14th, 1897, amounting to the sum of $315.22.

The said Cheshire Manufacturing Company conveyed all its interest in said seven notes and in the mortgage security therefor, on the 3d day of October, 1896, to the plaintiff, who has been ever since and is now the owner of the same.

On the 28th day of May, 1894, the defendant Curtis Thompson loaned to the said D. and H. Pratt the sum of $570, and to secure the note therefor took a second mortgage on said land. At that time Thompson examined the land records. The Pratts showed him the said agreement of May 14th, 1892, and represented to him that the sum of $3,400 had been paid on said twenty notes, so that there was then due on the said notes and secured by the prior mortgage, only $600. The mortgage to Thompson was at once recorded.

Upon the trial the defendant offered the testimony of the said David Pratt and Herbert Pratt, and claimed to have proved thereby that it was the intent of the parties to the said agreement of May 14th, 1892, not to have any part of the insurance money applied in payment of the said $542.82 note. In rebuttal of this testimony, the plaintiff offered the letter of May 17th, 1892, and in connection therewith the testimony that since said letter was received the Pratts had never objected to the application of the insurance money by the Cheshire Manufacturing Company, as was therein stated.

We think this letter with the evidence was properly admitted. If the Pratts really understood that the said note was not to be paid out of the insurance money, it is incredible that they should not have so stated when this letter came to Mr. Bronson. Their conduct then was an admission that

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that note was to be paid out of that money. And in this respect, the fact that the letter was shown only to one of the Pratts is not of much consequence. Mr. Bronson was the attorney of both in this agreement. His knowledge of the application of the money made by the Cheshire Manufacturing Company was the knowledge of the Pratts. The knowledge of an attorney gained in the very business in respect to which he is attorney, is imputed to his client. The notice to Mr. Bronson given by the said letter was notice to his clients. *Melms* v. *Pabst Brewing Co.*, 93 Wis. 153; *Constant* v. *University of Rochester*, 111 N. Y. 604.

The defendant Thompson claims that the plaintiff is estopped to assert that there is more than $600 due on said series of twenty notes. We are not able to find any ground for this claim. The recording of the mortgage to Thompson did not affect any right of the Cheshire Manufacturing Company in the land, or in the unpaid notes. The plaintiff sues to enforce a right which came to him from the Cheshire Manufacturing Company. No estoppel can exist against him unless one could have been set up against that company had it been the plaintiff. An estoppel by conduct always presupposes error on one side and fault or fraud on the other. *Morgan* v. *R. R. Co.*, 96 U. S. 716, 720. However much the defendant Thompson may have been in error, there is not the slightest pretense of any fault or fraud on the part of the Manufacturing Company, nor, indeed, on the part of the plaintiff.

There is no error.

In this opinion the other judges concurred.

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EZRA E. POST, EXECUTOR, *vs.* ALFRED JACKSON ET AL.

First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A testator gave the residue and remainder of his estate, real and personal, "to my nephews and nieces, they being my lawful heirs." *Held* that the nephews and nieces took as a class and were entitled to a *per capita* distribution of the property so bequeathed to them.

Extrinsic evidence is inadmissible in the construction or interpretation of a will where the language of a testator is free from ambiguity.

[Argued January 4th—decided January 21st, 1898.]

SUIT to determine the construction of the will of Horace Nettleton of Clinton, deceased, brought to the Superior Court in Middlesex County and reserved by that court, *Thayer, J.*, upon the facts alleged in the complaint and answers, for the consideration and advice of this court.

Horace Nettleton, late of the town of Clinton, made his will on the 14th day of January, 1892, by which he made certain bequests and legacies. On the 2d day of December, 1893, he made a codicil, by which he changed those legacies. On the 1st day of April, 1896, he made another codicil, as follows: "Whereas, I, Horace Nettleton, of Clinton, Connecticut, have by my last will and testament in writing, duly executed, bearing date January 14th, 1892, and by a codicil dated December 2d, 1893, given and bequeathed to William J. Kelsey $500, Eugene H. Kelsey $500, Chauncey N. Kelsey $500, the Methodist Episcopal Church $1,000, and the Missionary Society of the Methodist Episcopal Church the residue: Now I, the said Horace Nettleton, being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof, and I do hereby revoke all the said legacies, sections fourth, fifth, and sixth of my said will, and the whole of said codicil dated December 2d, 1893. And I give, devise and bequeath to my nephews and nieces, they being my law-

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ful heirs, all the rest and residue and remainder of my property, real and personal; and I do ratify and confirm my said will in everything except where the same is hereby revoked and altered as aforesaid. In witness whereof," etc.

It is alleged in the complaint that the nephews and nieces of the testator consist of the following persons, viz: Josiah A. Nettleton, only child of Augustus Nettleton, brother of the testator; Annie Nettleton and Ashford Nettleton, only children of Linus Nettleton, a brother of the testator; Alfred Jackson, Evelyn Jackson, and Adeline Hart, only children of Mary Jackson, a sister of the testator; John S. Nettleton, Warren O. Nettleton, Wilson F. Nettleton, and Annie A. Reynolds, only children of Danforth Nettleton; and Susan McNamar, only daughter of Alfred Nettleton, a brother of the testator; that some of said nephews and nieces claim that the said rest and residue, so devised and bequeathed by said codicil, should be distributed to them *per stirpes;* the others that it should be distributed to them *per capita.* All these nephews and nieces were made parties defendant. The complaint prayed for an adjudication of these questions.

Alfred Jackson, and those of the defendants who claim that there should be a *per capita* distribution, made answer in this way: "1st. These defendants admit the allegations of the complaint. 2d. The sister and the several brothers of the deceased Horace Nettleton mentioned in the complaint, died at the dates and ages as follows: Mary Jackson died December, 1854, aged 62 years; Danforth Nettleton died April, 1882, aged 80 years; Linus Nettleton died February, 1869, aged 79 years; Augustus Nettleton died July, 1882, aged 87 years; Alfred Nettleton died May, 1883, aged 79 years. Horace Nettleton, the testator, who was the youngest child, died September 6th, 1896, aged 86 years. He, as well as his brothers and sister, was born at the family home in Killingworth, Conn. All his life he had lived either in Killingworth, Mystic, Clinton, or Guilford, Conn. Clinton was his legal residence at the time of his death, and had been so for about twenty years. He was residing there

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when the original will was made. Katherine M. Kelsey, named in the original will, was the daughter of his second wife by a former husband. The home of her family was in the house adjoining that of Horace Nettleton in Clinton. His second wife died December 31st, 1891. At the time of making the second codicil, April 1st, 1896, Horace Nettleton was residing, and had been for two or three years continuously, with his niece, Anna A. Reynolds, at her home in Guilford, and he continued to reside with his said niece until the time of his death. During the whole of said residence of said Horace Nettleton with his niece, Anna A. Reynolds, at her home in Guilford, Wilson F. Nettleton of New Haven, a nephew of said Horace Nettleton, a brother of the said Anna A. Reynolds, and a widower without children, was frequently at his sister's house in Guilford, and it was understood, before the making of the second codicil, between himself and the said Horace Nettleton, that the said Wilson F. Nettleton might be called upon at any time to help take care of his uncle, Horace, and from time to time during the residence of the said Horace at the home of Anna A. Reynolds in Guilford, Wilson F. Nettleton did assist on several occasions in taking care of him, and helped to take care of him at the time of his death. The children of Horace Nettleton had both died some years before the making of the original will, leaving no issue. The various nephews and nieces of Horace Nettleton named in the complaint, were living at the date of the original will and ever since, at the places named in the complaint, and had been living at such places many years prior to the date of the original will.

"These defendants claim an order and decree settling the construction of said will, to the effect that said fund remaining for distribution be divided among the nephews and nieces of the said Horace Nettleton, *per capita*."

Josiah A. Nettleton, and those of the defendants who claimed that there should be a *per stirpes* distribution, answered in this way: "1. The defendants herein named admit the allegations of the complaint. 2. They also admit so much of paragraph second of the answer of Alfred Jackson

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and others as alleges that the brothers and sister of the testator died prior to his death, and so much thereof as alleges that his nephews and nieces are his only heirs. 3. The estate left by the testator to be distributed to his nephews and nieces under said will consists of $18,700 in money. 4. These defendants claim an adjudication and decree settling the construction of said will, and an order directing that the fund remaining for distribution be divided among the nephews and nieces of said Horace Nettleton, *per stirpes*."

These defendants also demurred to all of the second paragraph in the answer of Alfred Jackson et al., excepting what they had admitted, for the following reasons: "First. For the reason that parol and extrinsic evidence is not pertinent, competent or admissible in the construction or interpretation of wills; that the language used by the testator is clear, free from equivocation, ambiguity and uncertainty. Second. Because the allegations in said paragraph furnish no guide, information or aid in the construction of said will."

John W. Alling, for Alfred Jackson et al., claiming a *per capita* distribution.

Washington F. Willcox, for Josiah A. Nettleton et al., claiming a *per stirpes* distribution.

ANDREWS, C. J. The demurrer should have been sustained. There is no ambiguity in the language of the codicil. *Jackson* v. *Alsop*, 67 Conn. 249; *Woodruff* v. *Migeon*, 46 id. 236; *Patch* v. *White*, 117 U. S. 210, 224.

The language we are asked to construe is: "I give, devise and bequeath to my nephews and nieces, they being my lawful heirs, all the rest and residue and remainder of my property, real and personal." If the language had been, I give, devise and bequeath to my nephews and nieces the rest and residue and remainder of my estate, etc., there would have been a complete disposition of the estate, and there would have been no thought other than that the testator gave his estate to his nephews and nieces as a class, and that they

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each took an equal share; that is, that there should be a *per capita* distribution of the estate among them. If the language had been, I give, devise and bequeath to my lawful heirs all the rest, residue and remainder of my estate, although—as we know from the facts admitted in the answer—the estate would go to the same persons as in the former supposition, it would go to them in their character as heirs, and not in their character as nephews and nieces, and then there would be a *per stirpes* distribution among them. The attribute of being the nephews and nieces of the testator, and the attribute of being his lawful heirs, applies to the same persons. But a devise to them in the former character would produce a different result from a devise to them in the latter one. Indeed, a devise to them in the latter character would be inoperative. The statute of distribution would control. If property is left to the testator's heirs in the same manner and proportion in which they would take were there no will, the rule of law is that they take as heirs and not as devisees. The former is deemed the worthier title. *Howard* v. *Howard*, 19 Conn. 313, 318, WAITE, J. *Whitney* v. *Whitney*, 14 Mass. *88, *90; *Ellis* v. *Page*, 7 Cush. 161; *Sedgwick* v. *Minot*, 6 Allen, 171; 1 Jar. Wills, 74.

The testator having by the words first used, as above in the codicil, made a good devise to his nephews and nieces, as such, and to them as a class, it cannot be supposed that he intended by the words following that devise, to make his will wholly void. It seems reasonably clear that the testator intended to have his nephews and nieces share equally in his estate. The words "they being my lawful heirs," were used as explanatory of his reason for revoking the provisions of his original will and the first codicil. Other circumstances lead to the same conclusion. The testator was quite advanced in years; he was a widower, and childless; he had a comfortable estate; he was the last of a family of six children, all his brothers and his only sister having died before him, the last one of them in 1883; his nephews and nieces had been for more than ten years his only kindred by blood. They were all related to him in the same degree. They

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would naturally present themselves to his mind when he was preparing this last codicil, as directly related to him and each equally dear and an object of his bounty, rather than as representing to him his deceased brothers and sister. It was nephews and nieces, as such, to whom the testator gave his estate; and not to nephews and nieces as representing deceased brothers and sisters. We think the *per capita* distribution should be made.

The Superior Court is advised that a *per capita* distribution should be ordered of the fund in the hands of the plaintiff as executor.

In this opinion the other judges concurred.

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THE SECURITY COMPANY *vs.* ALPHEUS H. SNOW ET AL.

First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

After providing for his wife, a testator divided the residue of his property equally among his three children. By a codicil he revoked the gift to one of his daughters and in lieu thereof gave her share to his wife in trust, to be conveyed and paid over to the daughter "as my said wife may deem for the interest and welfare of my said daughter;" and directed that any portion of the trust property, principal or income, which should not be paid over or conveyed to his daughter during her life, should at her decease go to her "lawful heirs." The testator died in 1886 and the wife in 1895. The latter had paid over to the daughter the annual income from the trust property and a small portion of the principal. In a suit to determine the construction of the will, it was *held*:—

1. That under the statute against perpetuities which was in force when the testator died, the gift over to the "lawful heirs" of the daughter was void.
2. That the discretionary powers accorded to the wife in the discharge of the trust were purely personal and terminated at her decease; and that thereupon the trust ceased to be susceptible either of complete execution, or of partial execution in such a way as to satisfy the testator's design.
3. That the revocation of the original provision for the daughter was

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indissolubly coupled with the substituted trust provision, and effectual only so far as that was effectual.

4. That upon the wife's decease the former provision stood in its original force and carried the entire trust estate to the daughter in fee simple.

The doctrine of approximation can never be invoked where its application would sacrifice the main object of a testator to one of his incidental purposes.

[Argued January 5th—decided January 21st, 1898.]

SUIT by a testamentary trustee to determine the validity and construction of the will of Alpheus F. Snow, deceased, brought to the Superior Court in Hartford County and reserved by that court, *Prentice, J.*, upon the facts stated in the complaint, for the consideration and advice of this court.

From the complaint and answers the following facts appeared: The testator, Alpheus F. Snow of Hartford, died in 1886, leaving a widow, a son, and two daughters. His will, dated in 1884, made provision for his widow, and then disposed of his residuary estate as follows:—

"All the rest and residue of my property and estate, wheresoever being, I give, bequeath and devise in equal proportions to my son, Alpheus H. Snow, to my daughter, Ellen Snow, and to my daughter, Alice D. Snow, to them and their heirs forever, the railroad stocks to be divided without sale, but the share of my daughter Alice in such stocks not to be transferred to her until she shall be twenty-seven years old; the dividends thereon in the meantime to be paid to her by my executor, and the legacies to my daughters, in case of marriage, to be to their sole and separate use, free from the control or interference of their husbands."

In 1885 he made a codicil to this will, in two articles, as follows:—

"1. I revoke and annul any and all gifts, bequests, legacies and devises to my daughter Alice D. Snow, in or by virtue of said last will and testament.

"2. I give, bequeath and devise to my wife, Sarah M. Snow, any and all property and estate which was given, bequeathed and devised to my said daughter in and by virtue of said last will and testament, *in trust*, however, to be in-

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vested and managed by my said wife, and to be paid and delivered and conveyed by my said wife to my said daughter from time to time during her natural life as my said wife may deem for the interest and welfare of my said daughter, and any portion of said property and estate or the net income thereof which shall not be paid, delivered and conveyed as aforesaid to my said daughter during her natural life shall at her decease be paid, delivered and conveyed to her lawful heirs."

His estate was duly settled, and certain personal estate was distributed and transferred to the widow in trust for Alice, and certain real estate in Hartford surrendered to her as such trustee. There was also residuary real estate of the testator in other States. The widow never paid over any of the principal of the estate distributed to her in trust, but she received from time to time, as trustee, proceeds of land in another State, sold by the executor under a power in the will, and of timber sold therefrom, and paid them over to Alice from time to time, including them with the annual income of the trust in her accounts as trustee rendered to the Court of Probate. The widow died in 1895, and in January, 1896, the plaintiff was appointed trustee in her stead by the Court of Probate. It claims, as such, title to certain lands both in and without this State. Alice intermarried with Charles D. Burrill two months before her father's decease, and they have two minor children, and have had one who is not now living. She claims to have demanded from the plaintiff in June, 1896, a delivery of the trust estate to her as the owner in fee thereof, which the plaintiff refused. Shortly afterwards Alice D. Burrill et al. brought an action in the Superior Court for Hartford county to enforce said demand, which is still pending.

The trustee asked the direction of the court as to the following questions: (*a*) Is the gift over to the lawful heirs of Alice D. Burrill at her decease a gift of the estate to her lawful issue, or is the gift void? (*b*) Even if said gift over is void, does not the trust continue as applicable to the whole of the trust estate during the life of said Alice D. Burrill?

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(*c*) Was the discretionary power given by the testator to his wife "to pay, deliver, and convey said trust estate from time to time to his said daughter, Alice D. Burrill, during her natural life as she might deem for the interest and welfare of said daughter," a personal discretion to be exercised only by his said wife, or can said discretionary power be exercised by the plaintiff as trustee under said will by succession? (*d*) Is the said Alice D. Burrill entitled to demand and receive from the plaintiff at this time any portion of the principal of said trust estate?

Alpheus H. Snow, Ellen Snow, Mr. and Mrs. Burrill, and their children were made defendants, and answers were filed by all, admitting the truth of the allegations in the complaint.

Charles E. Gross, for the Security Company, and John M. and Amy L. Burrill, minors.

John T. Hubbard and *Charles D. Burrill*, for the defendants, Alice D. and Charles D. Burrill.

Alpheus H. Snow, of Indianapolis, Ind., filed a brief for himself and Ellen Snow, defendants.*

BALDWIN, J. The main scheme of the will in question was to make suitable provision for the testator's widow, and then divide his residuary estate equally between his three children; the shares of his daughters, in the event of their marriage, to be held to their sole and separate use. The codicil was made for the single object of placing the share of Alice under the control of his wife, as trustee for her benefit, with large discretionary powers. Mrs. Snow was directed to pay and convey the trust estate to Mrs. Burrill from time to time, as she, the trustee, might deem for the interest and welfare of Mrs. Burrill; and any portion of the estate "or the net income thereof" not so paid and de-

* Mr. Snow's brief was in no sense antagonistic to the claims of his sister, Mrs. Burrill.

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livered to her during her life, was at her decease to go to her "lawful heirs."

The trustee was not required to pay over the annual income from the trust estate to Mrs. Burrill during her life. The trust created was such that it might be terminated at any time during her life, at the discretion of the trustee. Whether it should endure for a few months or for many years was to be determined by Mrs. Snow, in view of what she might consider to be the true interest of Mrs. Burrill. The testator apparently thought it uncertain whether that would be promoted by her having in her own control either the entire principal or the entire income. He contemplated it as possible that part of the income might be withheld from her during her life; and made provision for that contingency, by the same gift in remainder, which he intended to carry to her lawful heirs any of the principal that might, at her decease, remain in the hands of the trustees.

The death of Mrs. Snow, before making over to Mrs. Burrill any considerable portion of the estate, rendered it thenceforth impossible to promote his daughter's interest and welfare in the manner contemplated by the testator. The discretionary powers which he gave to his wife for that purpose were purely personal and ended with her life. If the trust is to continue during Mrs. Burrill's life, there can be no further surrender to her of any portion of the principal, and either all the accruing income must be paid to her, or none. There is no express authority for paying over any of it, and if authority can be implied from the evident purpose of the testator to provide for her proper support, it must be conceded without limits.

The gift in remainder to her "lawful heirs" is void by reason of the statute of perpetuities which was in force when the testator died, under the rule laid down in *Leake* v. *Watson*, 60 Conn. 498.

If, then, the decease of Mrs. Snow left it possible to give the second article of the codicil any further effect, it can be only to keep the estate in the custody of the plaintiff during Mrs. Burrill's life, and give her meanwhile the entire income.

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This may amount to a greater sum than the testator thought it might be best for her to use under some circumstances, and a less sum than he thought it might be best for her to use under other circumstances. The person on whose judgment of her circumstances he depended for measuring out from time to time what on the whole would best promote her welfare, is no longer in existence. His will, therefore, as expressed in this article, cannot now be carried out, as to the disposition either of the income or principal of the trust estate.

If the plaintiff can retain the fund until the decease of Mrs. Burrill, it must be under the doctrine of approximation; but this can never be invoked where its application would sacrifice the main object of a testator to one of his incidental purposes. *Hayden* v. *Conn. Hospital*, 64 Conn. 320, 324. The main object of this article of the codicil was to benefit Mrs. Burrill by giving her whatever it was best for her to receive, both of the principal and income, of a share in his estate equal to that left to his other children. The provision for her heirs was inserted in view of an incidental contingency. Nothing was to come to them which it might be deemed judicious to turn over to her. During the life of Mrs. Snow the trust might have been given full effect, but only by a transfer of the entire estate to Mrs. Burrill. That not having been done, it is no longer susceptible either of complete execution, or of partial execution in such a way as to satisfy the testator's design.

The first article of the codicil expressly revokes the disposition made in the will in favor of Mrs. Burrill, but it is apparent that this was done not to diminish her equal share in the estate, but to transfer it to a trustee so as to secure it more effectually for her benefit. I give to my wife in trust, says the testator, "any and all property and estate which was given, bequeathed and devised to my said daughter in and by virtue of said last will and testament." It being his manifest intention to revoke the provision in the will only for this purpose, so far as the purpose fails of effect, the revocation must fall with it. Both articles of the codicil must

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be taken together to ascertain his true meaning. It was no part of this that he should die intestate in respect to the third of his residuary estate with which alone he was dealing. The revocation of his former provision for Mrs. Burrill was indissolubly coupled with the creation of the substituted provision. It may be given effect, so far as the substitution is valid, but no farther, because so only can the plain purpose of the testator be attained, and the mutual dependence of the two articles of the codicil preserved. The whole instrument was a single testamentary act, and must be read as if the testator had expressly declared that he revoked the gift made to Alice in his will simply in order to put it in a different form. *Rudy* v. *Ulrich*, 69 Pa. St. 177, 183; *Stickney* v. *Hammond*, 138 Mass. 116, 120; *Powell* v. *Powell*, L. R. 1 P. & D. 209.

The rule of construction upon which we proceed is analogous to that governing a revocation which is grounded on a state of facts which proves not to exist. It falls when its foundation falls. *Dunham* v. *Averill*, 45 Conn. 62.

The case of *James* v. *Marvin*, 3 Conn. 576, which holds that a revoking clause in a second will destroys the first, whether the second ever becomes effective as a testamentary act or not, was decided before our present statute of wills was enacted, and is therefore inapplicable to the question before us. *Peck's Appeal*, 50 Conn. 562.

The provision made in the will for Mrs. Burrill stands, therefore, unrevoked, except so far as her interest during the life of Mrs. Snow was placed under the latter's control. The trust was separable, and to that extent valid. *Wheeler* v. *Fellowes*, 52 Conn. 238, 247; *Morris* v. *Bolles*, 65 id. 45; *Ketchum* v. *Corse*, ibid. 85. Mrs. Snow could withhold the estate from her in whole or part, but the plaintiff has no such power. Mrs. Burrill's absolute title under the will, which was temporarily abridged or suspended under the second article of the codicil, resumed its original character upon the decease of Mrs. Snow, and the plaintiff holds simply upon a resulting trust in her favor.

The Superior Court is advised that the gift over to the lawful heirs of Alice D. Burrill is void; that the trust ter-

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minated at the decease of the original trustee; that the discretionary power given to that trustee cannot be exercised by the plaintiff as her successor; and that Alice D. Burrill became entitled, at the decease of Mrs. Snow, to demand and receive from the plaintiff the whole of the trust estate, to be held by her to her sole and separate use.

In this opinion the other judges concurred.

ISAAC KASHMAN *vs.* BETSEY M. PARSONS.

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First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A judicial determination in an action of ejectment, that no mutual mistake existed between the parties (grantor and grantee) as to the boundaries and extent of the land bargained for, as averred by the grantor (defendant) in her cross-complaint, does not preclude the latter, when again sued in ejectment by the grantee in respect to the same land, from alleging and proving that the conduct of the grantee since the conveyance has been such as to estop him from asserting his title to the strip of land in dispute. The two claims are essentially different, and the estoppel could not properly have been inserted in the cross-complaint and litigated in the former action.

In the second action the grantor (defendant) alleged that at the time of her conveyance to the plaintiff she claimed the strip in dispute as hers, as the plaintiff well knew, and did not include it in the land sold to the plaintiff. These averments were denied by the plaintiff. *Held* that the record of the former judgment was admissible and conclusive in support of this denial.

Where the issue raised by the pleadings is as to whether a certain request for a finding of facts in a former action between the same parties, was filed, the party holding the affirmative of this issue has the right to introduce a copy of such request, irrespective of the question whether the proceedings in which it was filed did or did not result in a judgment conclusive of the present controversy.

A special finding in an equitable action, made for the purpose of taking an appeal, has no conclusive effect upon the parties in a collateral suit, except to explain the scope of the judgment, where that is doubtful upon its face.

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The monuments which control the courses and distances stated in a deed, are confined to those to which the conveyance itself refers.

[Argued January 6th—decided January 21st, 1898.]

ACTION in the nature of ejectment, brought to the City Court of Hartford and tried to the jury before *Morse, Recorder;* verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors of the court in its rulings upon evidence. *Error and new trial ordered.*

The following facts appeared from the finding: In 1895 the plaintiff brought a former action of ejectment against the defendant in the same court, respecting the same land. The parcel in controversy was situated in Hartford, and was a narrow, triangular piece, running to a point on Main street. To that action a general denial was pleaded, and a cross-complaint was also filed. In the latter the defendant alleged that in 1894 she owned a house on the corner of Main and Canton streets, the lot being bounded west 60 feet, more or less, on Main street, north on Canton street 147 feet, more or less, and wholly surrounded by a substantial fence; that she also owned the adjoining land on the south and east; that she employed a broker to sell the house lot as fenced in; that the defendant bought it; that the deed, by mistake of the scrivener, was so drawn as to describe the lot conveyed as 60 feet wide in the rear, and 147 feet deep on each side, whereas in truth the lot so fenced in was only about 54 feet wide in the rear; that the defendant, relying on the accuracy of the scrivener and her broker's representation that the description was correct, executed the deed without reading it or knowing of the mistake; that the deed was thus made, by a mutual mistake of both parties, to include the triangular parcel now demanded; and that she first discovered the mistake in December, 1895, and then requested the plaintiff to correct it, which he declined. The prayer was for a reformation of the deed, and damages. The plaintiff answered denying any mistake.

The cross-complaint was tried separately, in March, 1896, and dismissed. The court, in the judgment file, found the issue for the original plaintiff, and "that there was no mutual

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mistake in the description and boundary of the land conveyed by said deed mentioned in the complaint, and further found that the allegations of the defendant, Betsey M. Parsons, and contained in said cross-complaint, that there was a mutual mistake in the description and boundary of the land conveyed by said deed, were not true in fact."

A special finding of facts was also filed, for purposes of an appeal. In this the following facts, among others, were stated: The house lot was fenced in, at the date of the bargain for the sale and of the deed, which was in 1894. The difference in width between the front and rear was not strikingly apparent, owing to a long shed near the east line. The broker told the plaintiff that the corner lot for which he was bargaining was 60 feet wide and 147 feet deep. The fences were never alluded to. The plaintiff knew that the defendant owned the land adjoining the corner lot on the south. A mortgage back was given for part of the price, and followed the deed in describing the bounds. Both conveyances were read over to the defendant, and she knew the deeds gave the plaintiff a width of 60 feet in the rear. Soon after his purchase the plaintiff rebuilt the rear fence for a distance of 60 feet from Canton street, and the defendant, at his request, paid half of the bill. Afterwards, in October, 1895, he employed an architect to prepare plans for a building to be put up on his lot, and measurements were made, which first showed him that the lot as fenced was only 53 or 54 feet wide in the rear. He did not then know, however, that the defendant claimed that she had only meant to convey to him the lot as fenced in. In November, 1895, the defendant began to put up a barn in the rear of her lot on the south. The barn reached to within 57 or 58 feet of Canton street. The plaintiff within a reasonable time sent her a written notice that she was encroaching on his premises, and also told the builder the same thing; but she replied that he owned nothing south of the fence.

In June, 1896, the original cause came on for trial upon the plea of a general denial, and the defendant set up her

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mortgage title, which was still outstanding, and obtained judgment on that issue.

Subsequently the plaintiff, having paid up the mortgage, and obtained a release thereof from the defendant, brought the present action. The answer was first a general denial, and then a second defense of estoppel. This alleged that the defendant sold the plaintiff only the lot as fenced in; that at the time of her conveyance she claimed the triangular parcel now demanded as part of her home lot on the south of the premises conveyed, which the plaintiff well knew; that in October, 1895, he well knew that his rear boundary was only 54 feet wide; that in November, 1895, she began to erect a barn, partly on the triangular parcel, and finished it in December; that the plaintiff during all this time resided on Canton street within fifty feet of the barn, and in plain view of it; that he passed it and saw it many times each day; but that he never intimated to the workmen or the defendant that the barn was on his land. A reply was filed, containing, first, a denial of most of the defendant's averments, and, second, such a denial together with a claim of *res adjudicata* based upon the judgment on the cross-complaint in the former action, and alleging that in that complaint and in a request she filed for a finding of facts upon the hearing thereon, every fact now set up in her answer was made the subject of a claim for relief. The defendant rejoined, admitting the filing of the cross-complaint in the former action, denying the other allegations in the second part of the reply, and averring that the only ground of relief set up in the cross-complaint was a mutual mistake entitling her to a reformation of the deed. The plaintiff surrejoined by a denial.

Upon the trial the plaintiff introduced the deed, mortgage, and release of mortgage, and proof of the disseisin. He also offered the record of the former action, claiming that it was material to and decisive of the issues on trial. The defendant objected on the ground that it was not material; that the issues in the two actions were different; and that

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the final judgment in the former action was in her favor. The court admitted the evidence.

The plaintiff then offered in evidence a request for a finding of facts filed in the former action, upon the ground that such request was a part of the record, and contained relevant admissions on the part of the defendant as to the matters set up in the amended answer in this case, which matters were or might have been litigated and decided in said former action. To the admission of this evidence the defendant objected on the grounds above stated, and upon the ground that such request was not a part of the record in said former action; but the court overruled said objection and admitted the evidence.

The defendant claimed that the land described in the deed was bounded on two sides by streets, and on the other two sides by land of the defendant; that the former land was separated from the latter land by well defined fences so clearly and distinctly as to make such fences a boundary or monument which should be or might be considered by the jury as more reliable than the distances stated in said deed, and offered evidence in support of such claim. To this evidence the plaintiff objected, on the ground that the matter of such boundary, monument, and distances had been, or might have been, litigated and decided in said former action; and on the ground that it appeared from the pleadings relating to and constituting said cross-complaint, and the judgment and finding thereon, in said former action, that the court had therein decided that the land in question had been included in said deed. The court sustained the objection of the plaintiff and rejected the evidence.

The defendant then offered evidence to prove that the plaintiff lived near the premises in question; and that in November and December, 1895, he knew that said barn was in process of erection on the land in question; and other matters relating to the erection of said barn. The plaintiff objected, on the ground that the matters claimed to be evidenced thereby were, or might have been, litigated and decided in said former action. The court sustained the objec-

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tion and excluded the evidence. The defendant offered no evidence as to disseisin, nor any further evidence. The court then submitted the cause to the jury with instructions to return a verdict for the plaintiff, which they accordingly did, assessing his damages at $1.

Charles E. Perkins and *Timothy E. Steele*, for the appellant (defendant).

The decision on the cross-bill was not a final adjudication upon all possible defenses which could be made to the second action. *Abbe* v. *Goodwin*, 7 Conn. 383; *Kennedy* v. *Scovil*, 14 id. 68; *Hungerford's Appeal*, 41 id. 227; *Fairman* v. *Bacon*, 8 id. 425; *Gaylord* v. *Freeland*, 47 N. E. Rep. (Mass.) 1019; *Wirtle* v. *Lockwood*, 39 Ohio St. 141; *Cramer* v. *Moore*, 36 id. 347; *Clark* v. *Blair*, 14 Fed. Rep. 813. It is too clear for controversy that the question of whether the jury should regard the boundary by the land of the defendant as a monument, which should control the distance given, was not a matter which could have been set up in the cross-bill as a ground for an equitable defense. It is equally well settled that estoppel in part is a legal defense. 1 Sw. Dig., top page 636; *Crandall* v. *Gallup*, 12 Conn. 371; 7 Amer. & Eng. Ency. of Law, 33; 2 Black on Judg. § 732. If the plea of estoppel might have been set up as an equitable, as well as a legal, defense, it was not so set up. The only issue presented by the pleadings in the cross-bill, was the question of reforming the deed, and upon that question any evidence relating to estoppel would not have been relevant. *Fairchild* v. *Lynch*, 99 N. Y. 368; *Cromwell* v. *Sac County*, 94 U. S. 356; *Davis* v. *Brown*, 94 id. 428; *Aurora City* v. *West*, 7 Wall. 106. The error of the plaintiff, and of the court below was, in confounding the issue in the cross-bill with the averments in it of immaterial facts not within that issue. 21 Amer. & Eng. Ency. of Law, 192, 193; *Crandall* v. *Gallup*, *supra*; *Dickinson* v. *Hayes*, 31 Conn. 427; *Hotchkiss* v. *Nichols*, 3 Day, 143; *Supples* v. *Cannon*, 44 Conn. 432; *Barlow* v. *Delaney*, 40 Fed. Rep. 100; *Burlen* v. *Shannon*, 99 Mass. 202; *Huntley* v. *Holt*, 59 Conn. 107; *Miles* v. *Strong*, 68 id. 288.

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Lewis E. Stanton and *Hugh O'Flaherty*, for the appellee (plaintiff).

The present claim is *res judicata*, and the defendant ought not to be admitted, against the former record, to allege that she was and is the owner of the land in dispute. *Huntley* v. *Holt*, 59 Conn. 107; *Pray* v. *Hedgeman*, 98 N. Y. 358; *Campbell Printing Co.* v. *Walker*, 114 id. 7. The defendant cannot escape the force of this law, on the ground "that the issues in said former action were different from the issues in this case." The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleading, but upon the fact that it has been fully and fairly investigated and tried. 2 Black on Judg. § 614. Nor can the defendant combat the force of these authorities on the ground "that the final judgment in said former action was in favor of the defendant," or that the judgment in the cross-complaint was in a suit different in its nature from the present, requiring different pleadings and different evidence from what was necessary in the case at bar. In the application of the principle of *res judicata*, there is no difference between courts of law and courts of equity; when an issue of fact or of law has been adjudicated upon the merits in either tribunal, it cannot be again litigated in the other. 2 Black on Judg. § 518. The facts set up in the second defense in the defendant's answer and the evidence offered by her in support of said defense, which evidence was excluded by the court, do not amount to an estoppel either at law or in equity. 6 Laws. Ri. Rem. & Pr. 4411; *Brant* v. *Virginia Coal Co.*, 93 U. S. 326; *Trenton Banking Co.* v. *Duncan*, 86 N. Y., 221; *Odlan* v. *Gove*, 41 N. H. 465; *Crest* v. *Jack*, 3 Watts, 240; *Knouff* v. *Thompson*, 16 Pa. St. 361. Under these circumstances, the only question for the jury to decide in the case was the amount of damage which should be awarded to the plaintiff.

BALDWIN, J. The cross-complaint in the first action of ejectment was based upon a claim of a mutual mistake. It set up that neither party supposed at the time that the land

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bargained for included the triangular parcel now in dispute, or that the deed embraced it in its terms of description. These allegations were put in issue, and the issues found for the present plaintiff.

In the present action the defendant's second defense is rested on estoppel, and in its support she pleads that she claimed this parcel as hers at the time of the conveyance, which the plaintiff well knew, and that all she sold him was the lot as then fenced in. These averments were denied, and the record of the former judgment was admissible and conclusive in support of this denial. Rules under the Practice Act, IV, § 12. It showed a finding adverse to the defendant on a point put directly in issue and material both in that action and in this: in that, because what each party supposed to be the subject of the sale at the time of the transaction bore immediately upon the question of mistake; in this, because the knowledge and supposition of the defendant at that time tended to show what his knowledge and supposition was later, when his omission to object to the erection of the barn was set up as a ground of estoppel.

The second part of the reply, after setting up the institution of the defendant's cross-complaint, proceeds to aver that she "afterwards in said cause filed also a certain request for a finding of facts in the cause. In said cross-complaint and request for finding of facts she set up each and every averment of fact which is now contained in her amended answer, and claimed relief therefor." The averments quoted were denied by the rejoinder, and the plaintiff had a right in support of them to introduce a copy of the request for a finding, irrespective of the question whether the proceedings in which it was filed did or did not result in a judgment conclusive of the controversy presented in the suit on trial. *Adams* v. *Way*, 32 Conn. 160. It is true that such a request constitutes no part of the record of a cause, except upon an appeal from the judgment founded on exceptions to which it is relevant; but it may contain statements which will be receivable in a subsequent action as admissions by the party in whose behalf they were prepared. Whether there were such ad-

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missions in this particular request was a matter which had not been put in issue by the pleadings: whether such a request was ever filed had been put in issue.

The evidence offered to show that the fences were a boundary or monument which the jury could consider as sufficient to control the distances stated in the deed, was properly excluded. The monuments which control courses and distances are those to which the conveyance itself refers. A reference to the adjoining land of the grantor as a boundary cannot be treated as describing a monument intended to control the dimensions stated, because of the existence of a fence which is not mentioned in the deed.

The objection taken by the plaintiff to the introduction of this evidence, that the matter was or might have been litigated in the former action, was untenable. That proceeding was to correct a mistake in the deed under which the plaintiff claimed, and the only mistake alleged was the description of the real boundary as sixty feet long. It was not contended then, as it is now, that the deed itself was consistent with the defendant's claim of title. But as the evidence was incompetent to vary the written contract, for the reason already stated, the ruling of the court can constitute no ground of appeal.

There was error in excluding the evidence offered by the defendant to prove the estoppel set up in her answer. The circumstances and conduct of the plaintiff, which she sought to prove, could not have been made the subject of final determination with respect to this question of estoppel, in the former action. They were material there only as evidential of what he knew or supposed at the time of the execution of the deed. The defendant's claim then was that he acted as if he had understood his purchase to be limited to the lot as fenced in, that is, as if the deed had been drawn as it was by mistake and did not follow the terms of their bargain. Her claim now is, that, notwithstanding he did not share her mistake but understood his purchase to cover the parcel in dispute, still by his subsequent silence, under circumstances and at a time calling for an assertion of his title,

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he so far misled her as to preclude him from a recovery upon it in this action. As to this she had a right to be heard under the issues closed.

The special finding of facts under the cross-complaint is not referred to in the judgment rendered. That is complete in itself, and sets forth upon what findings it is based. A special finding in an equitable action, distinct from the judgment, and made, as was that now in question, to facilitate the taking of an appeal, has no conclusive effect upon the parties in any collateral suit, except so far as resort may be had to it to explain the scope of the judgment, where that is doubtful upon its face, by showing what facts were the subject of inquiry and adjudication. For that purpose it is the best evidence, and takes the place that would be otherwise occupied by a witness.

The judgment on the cross-complaint was expressed in terms that are clear and definite. Its recitals state that all the issues were found for the plaintiff, and that there was no mutual mistake. The special finding was not needed to explain it, and the evidential facts which it sets forth spent their force when the ultimate facts were determined, upon which the judgment rests. The finding would not have been admissible, even as tending to show such evidential facts in answer to the evidence which the defendant offered, had that been admitted. Much less could it avail to exclude it altogether.

The plaintiff contends that the defense of estoppel was one of which the defendant might have availed herself in the former suit, and therefore cannot now be made the subject of litigation. To that action there was a perfect defense under the general denial; namely, that the legal title was in the defendant by virtue of a deed from the plaintiff. She had therefore no occasion to set up any estoppel in bar; nor could it properly have been introduced into her cross-complaint. If the deed was to be reformed, such relief could only be granted on proof of a mutual mistake at the time of its execution.

It is also argued that the defense of estoppel was unten-

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able, because when the defendant built her barn she held the legal title to the ground as mortgagee, and could not have been prevented by the mortgagor, had he made the endeavor, from improving her security at her own expense. Neither this question nor that of the sufficiency of the averments of the second defense to found an estoppel, was raised by the pleadings. The defense was denied, and it was not so manifestly unsubstantial or immaterial as to warrant the court in refusing to listen to any evidence of what had been alleged.

There is error, and a new trial is ordered.

In this opinion the other judges concurred.

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THE TOWN OF BRISTOL *vs.* THE NEW ENGLAND RAILROAD COMPANY.

First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The board of railroad commissioners has the power, in adopting a plan for the removal of a grade crossing on one street, to locate a wing wall or supporting abutment embodied in the plan, in an adjoining highway; and the question of the necessity of such location for the purpose intended, can be raised only by an appeal from the commissioners' order.

In the case at bar the plaintiff sought to restrain the defendant from placing a wing wall or supporting abutment upon North Main street. The defendant, in justification, set forth at length the order of the railroad commissioners directing the removal of a grade crossing on Main street, and alleged that it intended to build the structure complained of in exact accordance with this order. To this defense the plaintiff demurred, upon the ground that the order did not authorize nor justify the encroachment on North Main street. *Held*:—

1. That the site of the proposed abutment was sufficiently designated in the order and map of the railroad commissioners, and therefore the question whether any portion of the land within the true limits of North Main street was to be covered by this authorized structure, was immaterial.

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2. That the order indicated that the commissioners had fixed the location in question with the full understanding that it might be, and probably was, within the limits of the highway.
3. That the order being sufficient on its face, the question of a possible latent defect therein could not be raised upon demurrer; nor was it open to the plaintiff to attack the order as having been unadvisedly made, or as made under a misapprehension of essential conditions.

A demurrer to the effect that all the allegations of the answer are insufficient in law to justify the grievance set forth in the complaint, is too general.

In its answer the defendant set up two distinct defenses: the first consisting of admissions and denials of the allegations of the complaint, and the second of an alleged justification. Whether these defenses ought not, under the rules of the Practice Act, to have been alleged as a single defense, *quære*.

[Argued January 6th—decided January 21st, 1898.]

ACTION for an injunction to restrain the defendant from building an abutment or other structure as part of an overhead railroad crossing, within the limits of North Main street in Bristol, brought to the Superior Court in Hartford County and tried to the court, *Prentice, J.*, upon the plaintiff's demurrer to the defendant's second defenses; the court held such defenses sufficient and overruled the demurrers thereto, and the plaintiff appealed for alleged errors in the rulings of the court. *No error.*

The complaint contains two counts, the first being as follows:—"1. Main street and North Main street are highways of the town of Bristol, over which said town has all the rights and duties which by law are vested in towns as to their public highways. 2. Said streets are the two principal business streets of said town. The travel on both said streets, near and at their junction, is very great, on foot, and in trucks, wagons, bicycles, and other vehicles, and an electric street railway also passes from one street to the other at that corner, at a grade of about five feet to the hundred. 3. The defendant is planning to build a railway bridge over Main street, and an embankment on its land northerly of North Main street to support its railway tracks, and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment to support said embankment within

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the limits of said North Main street, and so as to encroach upon said street and occupy a strip thereof about forty feet long, about four and a half feet in width at the corner, and about six feet in width at the widest point, as shown by a map of said proposed encroachment hereto annexed and marked Exhibit A. 4. Said encroachment will greatly obstruct and inconvenience the travel on said highway; and, in addition thereto, it will, by cutting off the view of each street from travelers approaching the corner upon the other street, make said corner very dangerous because of the likelihood of collision between wagons and other vehicles, tramway cars, and foot passengers approaching said corner on the two streets. Such danger will be especially great because of the proposed operation of said railway across said bridge over Main street, and nearly parallel to and very near the line of North Main street, whereby horses will be liable to be frightened and become uncontrollable at and near said corner, by the sound and sight of passing railway trains. The plaintiff claims an injunction to restrain the defendant from building any abutment or other structure within the lines of North Main street, or in any way encroaching thereon."

The second count alleges: "Paragraphs 1 and 2 of the first count are made similarly numbered paragraphs of this count. 3. The defendant is planning to build a railway bridge over Main street and an embankment, wholly or in part, on its land on the north side of North Main street to support its railway tracks, and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment, or other structure, to support said embankment within the limits of said North Main street and so as to encroach upon said street and occupy a portion thereof about twenty-one (21) feet long, about eleven (11) feet in width at the corner, and about fourteen (14) feet in width at the widest point. 4. Paragraph 4 of the first count is made paragraph 4 of this count."

The defendant's answer to both counts is the same, and contains two defenses: "*First Defense.* 1. The defendant admits that Main street and North Main street are highways

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of the town of Bristol, and that the defendant is planning to build a bridge to carry its railway over the highway at the corner of Main and North Main streets, including as a necessary part of said bridge a stone wall or abutment to support it. 2. As to the other allegations of the plaintiff's complaint, the defendant has not sufficient knowledge to form a belief, and leaves the plaintiff to its proof thereof.

"*Second Defense.* On the second day of March, 1891, the railroad commissioners of the State of Connecticut duly made, after full hearing of all parties in interest, including the plaintiff in this action, an order, a copy of which is hereto annexed as Exhibit 1. A copy of each of the maps described in said order as delineating the alterations and changes ordered is also filed herewith, one to be marked Exhibit 2, and the other to be marked Exhibit 3. 2. The said order of the railroad commissioners was upon appeal affirmed by a decree of this court, July 29th, 1892. 3. The defendant, at the time when this action was brought, planned, and intended, and has ever since planned and intended, to build the embankment and stone abutment referred to in the complaint and alleged to be within the limits of North Main street in exact accordance with the said order of the railroad commissioners, affirmed by this court, and with said maps delineating the changes and alterations ordered."

Exhibit 1 is as follows:—

STATE OF CONNECTICUT,

OFFICE OF THE RAILROAD COMMISSIONERS,

HARTFORD, March 2d, 1891.

Be it remembered that on the 2d day of September, 1890, the following order for hearing and of notice was by us made in regard to the removal of the grade crossing of the New York & New England Railroad and the highway known as Main street, in the town of Bristol, viz.:

STATE OF CONNECTICUT,

OFFICE OF THE RAILROAD COMMISSIONERS,

HARTFORD, September 2d, 1890.

Whereas the directors of the New York & New England

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Railroad Company failed to remove or apply for the removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and,

Whereas in our opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as Main street in the town of Bristol, therefore, be it

Ordered, that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of September, 1890, at 9 o'clock, A. M., as to what alterations, changes or removals, if any, shall be made at said crossing and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing and adjoining that portion of said highway to be changed in grade, by George T. Utley, by depositing in the post-office in Hartford, postage paid, true and attested copies of this order on or before the 6th day of September, instant, addressed one to each of the following-named parties, viz.: The Selectmen, Bristol, Conn.; James W. Perkins, secretary, N. Y. & N. E. R. R. Co., Boston, Mass.; Henry W. Gridley, the Bristol National Bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol Savings Bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of Bristol, Conn.

Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, *Railroad Commissioners.*

And on the 24th day of September we met at the time and place named in said order, when it appeared and we do find that said order of notice had been duly complied with and that reasonable notice of said hearing had been given to said railroad company, to the municipality in which said crossing is situated, and to the owners of the land adjoining such crossing, and adjoining that part of the highway to be changed in grade; and all of said parties appeared and were

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heard in part, and the further hearing was by agreement adjourned until the 25th of November, 1891, at the town hall in said Bristol, where said parties again appeared and were heard. And the further hearing on said matter was from time to time adjourned until the 11th day of February, instant, at this office at 2 o'clock P. M., and on the 3d day of February, instant, a further order of notice was by us issued as follows, viz.:

STATE OF CONNECTICUT,

OFFICE OF THE RAILROAD COMMISSIONERS,

HARTFORD, February 3d, 1891.

Whereas the undersigned railroad commissioners of Connecticut on the 2d day of September, 1890, issued their order as follows, viz.: (here follows the order of September 2d, 1890, printed above).

And the hearing in said matter having been adjourned from time to time till the 11th day of February, 1891, at 2 o'clock P.M., at our office in Hartford, therefore,

Ordered, that notice of said adjourned hearing be given by Geo. T. Utley by depositing in the post-office at Hartford true and attested copies of said original order and of this order addressed to each of the parties named in said order of September 2d, 1890, on or before the fifth day of February, instant.

Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, *Railroad Commissioners.*

And pursuant to said adjournment and notice we met at said last-named time and place, when said parties again appeared and were fully and finally heard.

And now, after such notices and hearings, we being of opinion that the financial condition of the said New York & New England Railroad Company will warrant such order and that public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit: That the method of crossing be altered so that said highway instead of crossing said tracks at grade as at

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present, be carried under said tracks, and for that purpose that the location of the said crossing be changed by the removal of said tracks from their present location to a point about eighty feet southerly therefrom, the same being carried over said highway on a double-track iron bridge with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side and with supporting columns upon the gutter lines of the street; said street being excavated so much as may be necessary to give said head room with approaches not exceeding nine feet in a hundred on the north side of said crossing and level upon the south side, and not exceeding five feet in a hundred on North Main street, and four feet in a hundred on Prospect street; said alterations and changes being also delineated and shown on two maps on file in this office, one marked "N. Y. & N. E. R. R. proposed under crossing of Main street, Bristol, Conn., scale 50 feet to one inch, chief engineer's office, Boston, February 10th, 1891, L. B. Bidwell, chief engineer;" and the other marked "Proposed change of Main street crossing, Bristol, Conn., scale 40 feet to one inch, Boston, February 10th, 1891, L. B. Bidwell, chief engineer." All of said alterations, changes, and removals to be made and done by said railroad company, and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company.

Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, *Railroad Commissioners.*

The plaintiff demurred to the second defense in each count. The demurrer to the second defense in the first count is as follows: "1. All the allegations of said defense taken together are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main street in the manner described in the complaint. 2. The order of the railroad commissioners, referred to in paragraph 1 of said defense, and affirmed as alleged in para-

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graph 2 thereof, and the maps and exhibits 2 and 3, referred to in paragraph 1, as delineating the alterations and changes ordered, do not authorize any encroachment on said North Main street by an embankment to support the railway tracks of the defendant, or by a stone abutment to support said embankment. 3. The plan and intention of the defendant to build the embankment and stone abutment referred to in the complaint and alleged to be within the limits of said North Main street in exact accordance with the said order of the railroad commissioners, affirmed by this court, and with said maps delineating the changes and alterations ordered as set forth in paragraph 3 of said defense as amended, is not authorized or justified in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment or abutment. 4. Said order of the railroad commissioners, with the maps therein referred to, do not authorize any encroachment on North Main street for the purpose of locating, building, or maintaining the stone abutments referred to and described in said order."

The demurrer to the second defense to the second count, is as follows: "1. All the allegations of said defense taken together are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main street, in the manner described in said second count. 2. The order of the railroad commissioners referred to in paragraph 1 of said defense, and affirmed as alleged in paragraph 2 thereof, and the maps and exhibits 2 and 3 referred to in paragraph 1, as delineating the alterations and changes ordered, do not authorize an encroachment on said North Main street as described in said second count of the complaint by an embankment to support the railway tracks of the defendant, or by a stone abutment or other structure to support said embankment. 3. The plan and intention of the defendant to build the embankment and stone abutment referred to in said second count of the complaint, and alleged to be within the limits of said North Main street in exact accordance with the said order of the railroad commissioners

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affirmed by this court, and the said maps delineating the changes and alterations ordered as set forth in paragraph 3 in said defense, is not authorized or justified in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment, abutment, or other structure. 4. Said order of the railroad commissioners, with the maps therein referred to, do not authorize any encroachment on North Main street for the purpose of locating, building, or maintaining the stone abutment referred to and described in said order."

The demurrers were overruled by the trial court (*Prentice, J.*) and judgment rendered for the defendant. The appeal to this court assigns error "in overruling the demurrers."

Frank L. Hungerford and *Epaphroditus Peck*, for the appellant (plaintiff).

There is in the second defense no denial that the defendant in fact proposes to build its bridge abutments within the limits of North Main street, nor of the extent of the proposed encroachment. Unless such an encroachment is justified by the facts pleaded, the second defense is insufficient, and the demurrer to it should have been sustained. *Hotchkiss* v. *Plunkett*, 60 Conn. 230, 237; *Usher* v. *Waddingham*, 62 id. 412, 428; Steph. on Pl. (9th Amer. ed.) 200. It is for the defendant to plead a complete and perfect justification, not for it to plead ambiguous matter, and then cast upon the plaintiff the burden of showing that such matter does not justify the threatened injury. *Woodruff* v. *New York & N. E. R. Co.*, 59 Conn. 63, 92. The interpretation of a written document is a question of law, and not one of fact. *Auffmordt* v. *Stevens*, 46 Conn. 413; *Gibbs* v. *Gilead Eccl. Society*, 38 id. 167; *Jordan* v. *Patterson*, 67 id. 479; *State* v. *Main*, 69 id. 137; *Hotchkiss* v. *Higgins*, 52 id. 213; *Gallup* v. *Fox*, 64 id. 491, 494.

Edward D. Robbins, for the appellee (defendant).

If the plaintiff intended to question the jurisdiction of

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the railroad commissioners to make the order which has been pleaded in defense, it should have been explicitly so stated in the demurrers filed. The railroad commissioners ordered the railroad company to move the railroad tracks at Main street "from their present location to a point about eighty feet southerly therefrom," and to there carry them across Main street on a bridge. This necessitates the building of embankments and abutments to support the tracks and the bridge. The exact location of the tracks, embankment and abutments, is defined by reference to fixed monuments upon a map accompanying the order and described in it as delineating and showing the alterations and changes ordered. The plaintiff objects to the execution of this part of the order, because it carries a part of the embankment and of one abutment into North Main street. But the defendant cannot execute the order at all except by carrying it out according to its terms. The State acting through its railroad commissioners has full control of public highways, and the town of Bristol has no rights over North Main street except as an agent of the State. But it is said that the order of the railroad commissioners does not authorize the construction which is planned and intended by the defendant. If the counsel for the town believed this, it would seem as if their proper course would have been, as suggested by the court below, to deny the third paragraph of the answer. As the pleadings now stand, it appears that the construction intended is exactly what has been ordered by the railroad commissioners and by the Superior Court on appeal. If this is so, and if the order is valid, there is an end to discussion.

HAMERSLEY, J. The complaint alleges that the defendant intends to build a bridge for carrying its railroad tracks over Main street at the corner of that street and North Main street (they being highways within the limits of the town of Bristol), and threatens to build a stone abutment in connection with said bridge, so as to encroach upon North Main street and occupy a strip thereof as shown by the annexed map marked Exhibit A; and claims an in-

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junction restraining the defendant from building any structure within the limits of North Main street. Exhibit *A* is a map drawn to a scale, purporting to be a *facsimile* of the defendant's plan and profiles for the abolition of the Main street grade crossing at Bristol, prepared and signed by its chief engineer.

The right of the plaintiff to ask an injunction arises from the duties imposed upon it by law, as the agent of the State, in the maintenance and care of these highways; and the defendant in its second defense sets up the paramount authority of the State, exercised through an order of the railroad commissioners, appropriating this portion of the highway as necessary for the abolition of a public nuisance endangering the lives of its citizens who use the highways.

The answer contains a first defense, in which each allegation of the complaint is either denied or admitted, and a second defense which purports to allege extrinsic facts sufficient, if proved, to defeat the plaintiff's action, admitting for the purposes of the defense the facts stated in the complaint.

The allegations of the defense are: 1. The existence of an order by the railroad commissioners directing the defendant to remove its present grade crossing of Main street, and for that purpose changing the location of said crossing to a point eighty feet southerly at the corner of Main and North Main streets, and directing the defendant to there build over Main street and adjoining North Main street a bridge with a wing or supporting abutment whose location is definitely fixed by the maps which are a part of the order. 2. The structure which the defendant threatens to build, as alleged in the complaint and shown on the maps contained in the complaint, is in exact accordance with the command of the commissioners contained in the order and the maps which are a part thereof.

If these allegations of fact are denied and proved, a complete defense to the action is established. Instead of replying by denial or otherwise to the defense, the plaintiff

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has demurred; and the action of the court in overruling that demurrer is the only error assigned in this appeal.

Before dealing directly with the demurrer we consider what seems to be the plaintiff's conception of the fundamental defect claimed to be apparent in the second defense. It is this: An inspection of the record of the proceedings of the commissioners does not clearly indicate what portion, if any, of the land within the true limits of the highway is to be covered by the structure authorized. This claim is true; but it must be distinguished from a claim confounded with it, that the record does not precisely indicate that portion of the surface of the land which the structure authorized is to occupy. The latter claim is not true. A map drawn to a scale locating the structure in accordance with distances from permanent and known monuments, describes its actual location as precisely as is possible. Such is the character of the map now in question. It purports to denote corners of permanent buildings, and the center line of the appellee's present location fixed by public authority and made a matter of public record. It is unnecessary that a map of a projected structure, of the nature of that which was the subject of the orders of the railroad commissioners, should be so drawn as to describe every possible monument in the vicinity of its site. It is enough if it describes such and so many that, when viewed upon the ground and in relation to the ground, a competent surveyor can ascertain the points at which to set his stakes. The presumption is that the board of railroad commissioners, one of whose members the law requires to be a civil engineer, has made no order for the construction of a public work which cannot be precisely executed. On demurrer the answers which set forth such an order were entitled to the support of that presumption.

The exact position of the land to be occupied being thus sufficiently shown, any statement in the order of the precise point where the actual line of North Main street crosses this land is immaterial to the sufficiency of the defense. The commissioners are dealing with the abatement of a nuisance; their authority to order such construction of a bridge as is

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necessary to most thoroughly abate that nuisance is complete, including the power to occupy land covered by a highway. They have no authority to determine the disputed lines of a highway, and were not bound to do so in making the order. The defense set up is complete, whether the land the defendant is ordered to occupy is covered to the extent of one foot or of twenty feet by the easement of a highway. If the plaintiff, as guardian of that highway, thought its limits were unnecessarily encroached upon, it was its duty to appeal from the order. The legal exercise of discretion by the commissioners cannot be challenged in any other way.

But, in this connection, the plaintiff claims that the record does not clearly show that the commissioners intended that any portion of the highway should be occupied. We think the record does clearly show that the commissioners made this location with a full understanding that the land occupied might be, and probably was, within the limits of this highway. Assuming that there must be an intention to appropriate the portion of the highway within the limits of the land designated, we think that intention sufficiently appears on the face of the record, which includes the order expressed in writing and in maps. The commissioners apparently decided that the structure described, covering the land defined, was necessary to the abatement of the nuisance, notwithstanding a portion of the land defined might be covered by the adjoining highway; and ordered the defendant to build that structure. This they had the power to do, and were not bound to first adjudicate the legal limits of that highway, and then, in addition to the limitation of the use of the highway necessarily involved in the location of the structure ordered, to formally condemn or discontinue as a highway a precise number of square feet; the decision made and the structure ordered, were a sufficient appropriation for that purpose, of such portion of the highway as actually covered land designated. It follows that when the defendant alleges the existence of this order, and that the structure it threatens to build, as alleged in the complaint, is in exact accordance with the order, it sets up a complete

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and valid defense consistent with the truth of the essential allegations of the complaint. It alleges facts and not conclusions of law; it assumes the whole burden of proof properly belonging to it, *i. e.*, the burden of proving the existence of the order and the identity of the structure it has threatened to build, as alleged in the complaint, with the structure it has been ordered to build; and it does not, as claimed by the plaintiff, allege facts that in any event can be held equivalent to a general denial, for it admits the allegation material to the plaintiff's case, that the threatened structure is within the limits of the highway; and if the defendant fails to establish by proof the existence of the order and the identity of the structures, the admission of this fact entitles the plaintiff to judgment; if, on the other hand, the defendant does prove the facts it has alleged, then the fact admitted, material to the plaintiff's case, becomes immaterial to the case the defendant has established, and whether the fact so admitted is in reality a fact or not, cannot affect the defendant's right to a judgment.

"All demurrers must distinctly specify the reasons why the pleading demurred to is insufficient." General Statutes, § 873. Reasons for claiming the insufficiency of the second defense, not specified in the demurrer, do not demand discussion. The plaintiff is not entitled to a reversal of the judgment because the trial court did not sustain the demurrer for reasons not specified. The first reason stated in the demurrer is too general to have any force. It is claimed, under the fourth reason, that the clause in the written portion of the order directing the building of a bridge over Main street "with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side and with supporting columns upon the gutter lines of the street," controls the subsequent clause directing changes in North Main street, and contradicts and renders invalid that portion of the order contained in the maps which directs in detail the changes to be made in North Main street and fixes the exact location upon the surface of the land of the supporting wall or abutment to be there built. We do not so

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read the order. The description of the bridge over Main street as one with abutments on the street lines and supporting columns on the gutter lines of that street, exhausts its force in describing the abutments and supporting columns mentioned, and that description cannot be construed as applicable to the portions of the order dealing with changes in other streets, nor as compelling a wing or supporting abutment on North Main street to be located upon the street line notwithstanding the portion of the order directing these changes locates with certainty the abutment in a different place.

Giving the widest allowable scope to the language of the two other reasons, they present in addition to the points already considered, only this claim: that the railroad commissioners had no power, in their order for the elimination of the grade crossing at Main street, to direct the abutment in question to be built within the lines of North Main street; and if they had such power they have not given such directions. If the commissioners had the power to order the erection of the abutment as described, covering a portion of the highway, it is immaterial to the sufficiency of the second defense, for reasons already stated, whether or not the abutment ordered actually extends within the legal lines of North Main street. That they had the power under Chap. 220 of the Public Acts of 1889, to order any changes or alterations in highways, including their partial discontinuance necessary to the elimination of a dangerous grade crossing, of which necessity the commissioners are the judges, subject to a review of their proceedings on appeal to the Superior Court, and that the law conferring this power is constitutional, is too well settled to be now questioned. *Suffield* v. *New Haven & N. Co.*, 53 Conn. 367, 370; *Fairfield's Appeal*, 57 id. 167, 171; *State's Attorney* v. *Branford*, 59 id. 402, 407; *Cullen* v. *New York, N. H. & H. R. Co.*, 66 id. 211, 222; *New York & N. E. R. Co.'s Appeal*, 62 id. 527. An appeal was taken from the order in question to the Superior Court and the order was affirmed by that court, and the judgment of the Superior Court was affirmed by this court in the case

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last cited. To all these proceedings the plaintiff was a party. So far as concerns this plaintiff the question of public safety and that of the necessity of occupying any portion of North Main street for the elimination of the grade crossing as ordered, is *res judicata*. *State's Attorney* v. *Branford*, *supra*, p. 411.

The plaintiff suggests in argument that the course of proceedings by the commissioners, as recited in the order, lays no valid foundation for an order directing changes in North Main street. The record of the commissioners' proceedings on its face seems sufficient to justify any necessary change in that highway, and being sufficient on its face, the question of some possible latent defect cannot be raised by this demurrer, even if the plaintiff could raise it in any way other than by appeal.

The brief and argument of the plaintiff suggest that its real grievance is based on the assumption that the second defense in some way cuts off or abridges its right to establish upon trial the claim that whatever this order may apparently say, the commissioners did not in fact intend to authorize the occupation of any part of North Main street, and therefore did not authorize an abutment extending over the line of that street. We fail to see how this right, if the plaintiff has such a right, is in any way affected by the mode of pleading the second defense, or how the demurrer can be construed as specifying such a reason for the insufficiency of the pleading. If the plaintiff can in this action, or in any other action, attack the validity of the order, or establish a meaning not apparent on its face, because the order was made under a misapprehension of essential conditions, it certainly cannot do so by means of this demurrer.

We think the question raised by the demurrers to the second defenses to the first and second counts, do not materially differ; no claim was made in argument that the same considerations did not apply to both demurrers.

There may be doubt whether the true theory of the Practice Act would not in a case like this require the defendant to allege the facts set up in the second defense, in connec-

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tion with those set up in the first, as a single defense, rather than to make such facts the basis of a separate and distinct defense. The practical results of following either form may be substantially the same, and any error in such a matter is waived if not specified in a demurrer. As the question is not material to our decision we merely mention the doubt, in order to avoid any implied approval of the form followed.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

THE NATIONAL CASH REGISTER COMPANY *vs.* MILO K. WOODBURY.

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71 365

First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The absolute title to personal property in the possession of a vendee under an unrecorded contract of conditional sale, passes to his trustee in insolvency, notwithstanding the latter had actual knowledge, before the assignment, of the terms of the conditional sale, and afterwards had notice of the debtor's failure to make the stipulated payments. Such knowledge upon the part of the trustee cannot affect the creditors of the insolvent debtor.

[Argued January 7th—decided January 21st, 1898.]

ACTION of replevin to recover possession of a cash register, brought to the Court of Common Pleas in Hartford County and tried to the court, *Case, J.*, upon the defendant's demurrer to the plaintiff's reply; the court sustained the demurrer and rendered judgment for the defendant, and the plaintiff appealed for alleged errors in the rulings of the court. *No error.*

The complaint was brought on the 15th day of March, 1897, to recover possession of "one cash register, number 101, 221," which it alleged the defendant wrongfully detained from the plaintiff. The answer alleged, in substance, that the

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defendant on the 24th of February, 1897, was duly appointed by a Court of Probate in this State, trustee of the insolvent estate of one Raiche, and had duly qualified as such and accepted said trust; that among the assets and property of said Raiche and in his possession, the defendant found the cash register in question, which he had inventoried and claimed to hold as part of said estate. The reply admitted the facts set up in the answer, with the exception of the allegation that the cash register was the property of Raiche, and then in substance proceeded as follows: Raiche obtained the cash register of the plaintiff on or about July 1st, 1896, under the provisions of a conditional bill of sale, by the terms of which the register was to remain plaintiff's property until fully paid for by monthly installments, and in default of any such payment plaintiff might take possession of and remove said register, "of which facts the defendant, on or about February 13th, 1897, and previous to the assignment in insolvency of said Raiche, had notice by himself and by his attorney George B. Fowler; that said monthly payments were not made by said Raiche as agreed, of which the defendant had notice on or about March 6th, 1897; that the defendant though often requested, and particularly on or about March 15th, 1897, would neither pay the balance due on said register nor allow the plaintiff to take possession of it; whereupon the plaintiff obtained possession of said cash register by this writ of replevin."

To this reply the defendant demurred, on the ground that it was not averred and did not appear that the conditional bill of sale was either acknowledged or recorded as required by statute.

John Hamlin, for the appellant (plaintiff).

The trustee in insolvency is the personal representative of the insolvent debtor and, so far as this plaintiff is concerned, held the cash register in question under the same terms and subject to the same conditions as applied to it in Raiche's hands. *Palmer* v. *Thayer*, 28 Conn. 244; *Cooke* v. *Thresher*, 51 id. 107; *Merwin* v. *Austin*, 58 id. 34; *Adams* v. *Lee*, 64

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N. H. 422; *Baker* v. *Tolles*, 36 Atl. 551; *Hooven, O. & R. Co.* v. *Burdett*, 153 Ill. 679. Undoubtedly for certain purposes a trustee in insolvency represents creditors; *Trumbull* v. *Hewitt*, 62 Conn. 450; but this is the *one exception* to the general rule that a trustee can only do what the insolvent could have done with regard to the latter's property. A trustee in insolvency is not an attaching creditor nor a *bona fide* purchaser, but the representative of the insolvent only. *Hooven, etc., Co.* v. *Burdett*, *Adams* v. *Lee*, *supra*. The object of recording papers is simply to give notice of their contents; and is entirely unnecessary as to an attaching creditor, in cases of conditional sale, if the creditor had notice of the terms of the sale previous to the attachment. If the trustee represents creditors, stands in their place, and is their agent, then the knowledge of the trustee is the knowledge of the creditors. *First Nat. Bank* v. *Tufts*, 53 Kan. 712; *Batchelder* v. *Sanborn*, 66 N. H. 192; *Central Trust Co.* v. *Arctic, etc., Co.*, 77 Md. 203; *Frank* v. *Batten*, 49 Hun, 91. No lien attaches, and no equity arises in favor of creditors, by virtue of the statute, unless they take the steps prescribed by law to assert their rights. *Keller* v. *Smalley*, 63 Tex. 519; *Union Trust Co.* v. *Trumbull*, 137 Ill. 180; *Gill* v. *Pinney*, 12 Ohio St. 46. The statute should receive a strict construction. *Wooley* v. *Geneva Wagon Co.*, 35 Atl. 790; *Campbell, etc., Co.* v. *Dyer*, 46 Neb. 830.

George B. Fowler, for the appellee (defendant).

A trustee in insolvency is not a "personal representative" of the insolvent debtor, but represents creditors. *In re Wilcox & Howe Co.*, 70 Conn. 220; *Davies* v. *Davies*, 55 id. 324; *Swift* v. *Thompson*, 9 id. 69; *Shipman* v. *Ætna Ins. Co.*, 29 id. 254; *Taylor* v. *Atwood*, 47 id. 507; *Shaw* v. *Smith*, 48 id. 313; *Trumbull* v. *Hewitt*, 62 id. 450. It is absurd to say that Milo K. Woodbury, a creditor, can attach the property for his debt; but Milo K. Woodbury, trustee in insolvency and representative of creditors, cannot. This statute is different from § 2961, Gen. Statutes, relating to the recording of deeds of land. In the latter the sole purpose of the record is no-

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tice, and contending parties are left to work out their equities as the case may be. The statute involved in this case fixes by law the status of the parties on failure to comply with its terms; it passes upon and decides the equities; and the equities are in favor of creditors. *Rood* v. *Welch*, 28 Conn. 157; *Gilday* v. *Warren*, 69 id. 237. The contract in this case belongs to that same class of transactions which, although made in actual good faith, are by law deemed fraudulent and void.

TORRANCE, J. In July, 1896, the plaintiff delivered to Raiche a cash register, under a contract of sale conditioned that the title to the register should remain in the plaintiff after such delivery until the price of the register should be paid. The contract was neither acknowledged nor recorded as required by the statute. In this condition of things, and while the price of the register remains unpaid, Raiche makes an assignment in insolvency for the benefit of his creditors, under our statute, and his trustee, finding the register in Raiche's use and possession, inventories it and holds it as part of the insolvent estate.

If these were all the facts in the present case, it would be governed, as the plaintiff concedes, by the decision just made by this court in the case of *In re Wilcox & Howe Co.*, *ante*, p. 220; but the plaintiff claims that there is an additional fact in this case which differentiates it from the *Wilcox & Howe Co.* case, and that is, the knowledge which it is alleged and admitted the defendant had of certain matters prior to and after his appointment as trustee.

It is admitted that the defendant, prior to the assignment in insolvency, and of course prior to his appointment as trustee, had notice of the conditional bill of sale under which Raiche held the register, and of its terms, so far as they are recited in the reply; and that after his appointment as trustee the defendant had notice that Raiche had not made the monthly payments as agreed.

We are of opinion that this notice and knowledge on the part of the defendant, as alleged, is of no importance in the

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present case. In his argument on this part of the case, the plaintiff assumes that if the creditors of Raiche, prior to the assignment, had had the notice and knowledge which it is alleged the defendant had, the conditional bill of sale would be available to the plaintiff as against them. Whether this would be so or not, we have no occasion to consider nor to decide here, for we are of opinion that the knowledge of the defendant, prior to the assignment, was not the knowledge of the creditors at all, either in contemplation of law or otherwise. What he then knew of the conditional sale, he knew simply as an individual and not as an agent or representative of the creditors. If such knowledge could ever be imputed to the creditors, it clearly could not be so imputed until the defendant was appointed trustee and began to act for them in that capacity. *Farmers' & Citizens' Bank* v. *Payne*, 25 Conn. 444; *Farrel Foundry* v. *Dart*, 26 id. 376; *Platt* v. *Birmingham Axle Co.*, 41 id. 255; *New Haven M. & W. R. Co.* v. *Chatham*, 42 id. 465. No claim is made that he communicated this knowledge to all or any of the creditors, and for aught that appears he was then as to them an unknown stranger. Prior to the assignment, then, the creditors of Raiche were not affected by the knowledge possessed by the defendant as an individual, and they were, up to that time, so far as the plaintiff is concerned, creditors without notice. The fact, then, that the defendant possessed such knowledge prior to the time of his appointment, cannot avail the plaintiff.

Can the fact that he possessed such knowledge immediately after his appointment as trustee, as he undoubtedly did in point of fact, be of any avail to the plaintiff? We think not. So far as the creditors in the present case are concerned, such notice must be regarded as then coming to the trustee for the first time, and as coming too late. After the assignment, when the property of Raiche had been sequestered by law for the benefit of his creditors, notice of the conditional sale, other than that which the statute requires, came too late to be of any avail to the conditional vendor. The property then was in a position similar to that which it would

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have been in if it had been attached or levied upon by creditors without notice; and in such case, clearly, notice of the conditional sale other than that which the statute requires, coming to such creditor after the levy of attachment or execution, comes too late to be of any avail to the conditional vendor. The case at bar, then, is not distinguishable from the case of *In re Wilcox & Howe Co.*, and is governed by the decision in that case.

There is no error.

In this opinion the other judges concurred.

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JOHN M. WHEELER ET AL. *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A cause is not to be erased from the docket unless the want of jurisdiction plainly appears on the face of the record.

The General Statutes permit an appeal from the decision of the board of railroad commissioners in the matter of the removal of a grade crossing, while a Special Act for the abolition of grade crossings in Bridgeport provides that the decision of the board of railroad commissioners shall be final and conclusive. *Held* that inasmuch as it did not appear from the record that the proceedings instituted by the railroad company were brought under the Special Act, the Superior Court erred in erasing the appeal from its docket.

[Argued January 18th—decided February 8th, 1898.]

APPEAL from a decision of the railroad commissioners involving the condemnation of the plaintiff's land, taken to the Superior Court in Fairfield County where the cause, upon motion of the defendant, was erased from the docket (*Elmer, J.*) for want of jurisdiction, and the plaintiffs appealed for alleged error in this ruling of the court. *Error and case restored to docket.*

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The material facts stated in the complaint are as follows: "1. The petitioners own a valuable piece of property situated in said Bridgeport, bounded southwest by Bridgeport harbor, northwest by the tracks of the New York, New Haven and Hartford Railroad Company, north by Sterling street, east by Noble avenue, and south by land of Frank Miller and others. . . . 6. On December 21st, 1895, said company and the directors thereof, whose road then did and ever since has crossed and was and is crossed by numerous highways at grade in said Bridgeport, brought their petition in writing to the railroad commissioners of this State, therein alleging that public safety required an alteration in said crossings, their respective approaches, the method of crossing the same, the location of the same, the closing of said highway crossings and the substitution of certain other crossings therefor, not at grade, and as a part of the method proposed by them for accomplishing said results they presented plans, one detail of which involved the taking of a strip of land seventy feet wide through the middle of your petitioners' said property and the construction of an elevated railroad structure thereon; and they prayed that said work might be ordered according to the plans so presented. . . . 10. On May 17th, 1897, said company and the directors thereof brought their supplemental petition in writing to the railroad commissioners, alleging by reference the same facts as in their original petition, and also then alleging for the first time that your petitioners had an interest in land needed for certain of said crossings. . . . 13. On June 30th, 1897, said railroad commissioners determined and decided that said changes, alterations and removals should be made by said company, including that part thereof that involved the taking of your petitioners' property and the destruction thereof and of their said business."

The complaint was duly served and returned to the Superior Court in and for the county of Fairfield on the first Tuesday of September, 1897, and was duly entered upon the docket of said court.

On the 21st day of October the said railroad company moved the court that said "cause be erased from the docket

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of the Superior Court, on the ground that said court had no jurisdiction of the subject-matter contained therein." The court granted that motion, and the plaintiffs appealed.

Robert E. DeForest and *Allan W. Paige*, for the appellants (plaintiffs).

Goodwin Stoddard and *William D. Bishop, Jr.*, for the appellee (defendant).

ANDREWS, C. J. A cause is not to be erased from the docket unless the want of jurisdiction appears plainly on the face of the record. *James* v. *Morgan*, 36 Conn. 348, 351; *Wickwire* v. *State*, 19 id. 477, 484; *Saunders* v. *Denison*, 20 id. 521, 525; *Camp* v. *Stevens*, 45 id. 92, 95.

The Superior Court has jurisdiction generally of appeals from the doings of the railroad commissioners in respect to grade crossings. General Statutes, §§ 3425, 3491; Public Acts of 1889, Chap. 213; id., Chap. 220, § 6.

The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and on the contrary nothing shall be within the jurisdiction of an inferior court but that which is expressly so alleged. *Peacock* v. *Bell*, 1 Saund. 74 *b*; *Winford* v. *Powell*, 2 Ld. Raym. 1310; *Stanian* v. *Davies*, ibid. 795.

There is nothing on the face of the record, so far as we are able to discover, that discloses any want of jurisdiction in the Superior Court to act upon the matter set forth in the complaint. Indeed, the brief of the appellee in this court does not make any such claim. The brief says that the petitions referred to in paragraphs 6 and 10 in the appellants' complaint, were brought under the authority of a Special Act passed in 1895, (12 Special Laws, 416) being an act "Providing for the Abolition of Grade Crossings in Bridgeport," which provided that the "decision of the railroad commissioners upon all questions of the plans or methods of abolishing said grade crossings shall be final and

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conclusive upon all parties concerned," and claims that therefore the Superior Court had no jurisdiction over the subject-matter alleged in the record.

The fatal defect in this argument is that the matters which it relies on to show the want of jurisdiction, do not appear in the record. It is new matter which could only be brought upon the record by some issuable averment. For the purpose of a motion to erase from the docket the court could not have any knowledge of this matter, as the record then stood.

There is error, and the cause should be restored to the docket.

In this opinion the other judges concurred.

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In Re Application of the Shelton Street Railway Company.

Third Judicial District, New Haven, Jan. Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

The statutory requirements of an appeal to this court must be strictly complied with in order to properly perfect the appeal.

Under §§ 13 and 22 of Chap. 194 of the Public Acts of 1897, an appeal from a decision of a judge of the Superior Court to "the Supreme Court of Errors," without specifying therein the time or place of holding that court, is substantially defective and may be taken advantage of by plea in abatement.

A general appearance in this court is not of itself a waiver of the right to object to a defect in the process.

[Argued January 18th—decided February 8th, 1898.]

Application for a finding that public convenience and necessity requires the extension and construction of a street railway parallel to the line of a steam railroad, made to the *Hon. George W. Wheeler*, a judge of the Superior Court; facts found and judgment rendered in favor of the appli-

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cant, and appeal by the respondents for alleged errors in the rulings of the judge.

In this court the appellee filed a plea in abatement, to which the appellants demurred. *Plea sustained and appeal dismissed.*

The appellants also moved to reject the plea in abatement, claiming that it was not filed with the proper clerk. This motion was denied, for the reasons stated in *Vincent* v. *McNamara*, *post*, 332.

The appeal to this court, filed by the appellants on January 6th, 1898, states that the parties appeal "to the Supreme Court of Errors," and does not state an appeal to any specific term, nor state any time or place for holding the court, and the plea alleges these defects as ground of abatement. The appellants demur for the reasons: 1. The plea does not show that the appellee did not have actual knowledge from the proceedings below, that the appeal was taken to this term of court. 2. That the "notice of appeal" filed in the court below, states the term to which the appeal will be taken. 3. That the record does not show the appeal to be taken to any term other than the present term of this court.

The appellants also read in court an answer, alleging, in bar, a general appearance by the appellee and other facts appearing in the record, and stated that they wished to file this answer in case their demurrer should be overruled. The appellee stated they should demur to the answer, if filed. By agreement of parties the sufficiency of the plea was argued as if the questions had been raised by the appellant's answer to the plea, as well as by their demurrer.

Goodwin Stoddard and *William D. Bishop, Jr.*, for the appellants.

Allan W. Paige and *George W. Carroll*, for the appellee (petitioner).

HAMERSLEY, J. A general appearance is not, of itself, a waiver of the right to object to a defect in the process.

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Payne v. *Farmers and Citizens' Bank*, 29 Conn. 415, 416; *Hotchkiss' Appeal*, 32 id. 353, 355.

The other facts stated in the answer set forth the same matters of record referred to in the demurrer to the plea; and their allegation is, in substance, a claim that upon the face of the record the plea in abatement is insufficient.

The appeal to this court is a process whose form and requirements are fixed by statute. These provisions must be strictly complied with in order to properly perfect an appeal. *White* v. *Howd*, 66 Conn. 264, 266. The statute says that the appeal must state the time and place of holding the court to which the appeal is taken. Public Acts of 1897, Chap. 194, § 13. This appeal states neither time nor place; it is taken to "the Supreme Court of Errors," without any specification of a term.

The appellants, however, claim that this requirement of the statute is a mere matter of form; that it is apparent from the record that the present term of this court is the only one to which the appeal could by law be taken, and therefore it must be regarded as in fact taken to this term; and that the defect is cured by § 1000 of the General Statutes. This claim rests on the assumption that the term of court to which this appeal should have been taken, is determined by § 2 of the Act and not by § 22. The provisions of these sections are distinct and different. The former affects appeals from judgments rendered at a regular session of the Superior Court, and requires the appeal to be taken to the term to be held next after the filing of the appeal in the judicial district or county where the judgment was rendered; while the latter affects appeals from judgments rendered by a judge exercising the power of that court in chambers, and requires the appeal to be taken to the term "next to be held in the judicial district or county where the parties or any of them reside." This appeal is controlled by the provisions of § 22. No other Act authorized it. The parties resided in different counties. The statute is so phrased as to give some ground at least, for the claim that the appeal might have been taken to the next term held in New Haven county, or to the next

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term held in Fairfield county. The appellee in a case of this description is not bound to construe the statute at his peril; that duty rests on the appellant. No appeal could be taken in this cause until the appellants designated the term to which they appealed. The failure to state the time and place of holding the court in this appeal is therefore a substantial defect.

That a defect of this nature may be taken advantage of by a plea in abatement, is not an open question. *Phelps* v. *Norton*, 35 Conn. 327; *Redfield* v. *Buck*, ibid. 328, 333; *Comstock's Appeal*, 54 id. 116; *Pitkin* v. *New York & N. E. R. Co.*, 67 id. 19; *Montville Street Ry. Co.* v. *New London N. R. Co.*, 68 id. 418. See also *Chipman* v. *Waterbury*, 59 id. 496.

Section 31 of the Act, and Chap. 135 of the Public Acts of 1897, relate to the manner of perfecting appeals taken under § 22, but do not control the term to which such appeals shall be taken.

The plea in abatement is sustained and the appeal dismissed.

In this opinion the other judges concurred.

SILAS A. VINCENT *vs.* MICHAEL MCNAMARA.

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Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The clerk of the Supreme Court of Errors who makes up and has charge of the docket for the judicial district at any term, is the only clerk with whom to file original papers presented during the term. But where such papers are required to be filed before the opening of the term to which the appeal is taken, they may be filed either with the clerk for the county in which the judgment appealed from was rendered, or with the clerk for the county in which the term is to be held.

The ten days within which an appellant must, under certain circumstances, appeal to the Supreme Court of Errors, begins to run from

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the time final judgment is entered up, and not from the date of the decision from which such judgment results.

A demurrer to the plaintiff's complaint was sustained on November 30th and an entry to that effect was made upon the record by order of the Superior Court. On December 31st the court, upon the plaintiff's motion, entered up judgment as of that date for the defendant, from which the plaintiff within ten days thereafter appealed. *Held* that the appeal was seasonably taken.

An action to recover damages from the defendant, a business competitor of the plaintiff, for a malicious attachment of the plaintiff's goods and the consequent injury to his business, is not barred by a former judgment in favor of the plaintiff in an action of replevin against the attaching officer alone, to regain possession of the goods attached together with damages for their wrongful detention. The causes of action are different and distinct.

An unsatisfied judgment against one of two joint trespassers for the damages resulting from the trespass, does not bar a later suit for the same damages against the other.

[Argued January 19th—decided February 8th, 1898.]

ACTION to recover damages for a malicious attachment of the plaintiff's property and the consequent injury to his business, brought to the Superior Court in Fairfield County and tried to the court, *Elmer, J.*, upon the defendant's demurrer to the complaint; the court sustained the demurrer and rendered judgment for the defendant, and the plaintiff appealed for alleged errors in the rulings of the court. *Error and judgment reversed.* In this court the appellee filed a plea in abatement. *Overruled.*

The complaint alleged that on October 16th, 1894, the defendant owned the only feed store and grist mill in a certain quarter of the town of Brookfield; that on that day the plaintiff opened another such store and mill there for business, and at once became a competitor of the defendant in the feed and grain business; that in November the defendant caused a writ of attachment to be issued against a third party, and then maliciously attached thereon the stock in trade of the plaintiff for the purpose of breaking up his business, thereby closing up his mill and store for several days, hindering his business, and keeping him out of possession until December, when he replevied the goods from the attaching officer; that when replevied, they were damaged

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and in part spoiled; that in February, 1897, he obtained final judgment against the officer in his replevin suit; that the defendant knew or ought to have known at the time of the attachment that the plaintiff owned the goods, but nevertheless ordered the officer to attach them and close up the store and mill, for the purpose of annoying and harassing him and driving him out of business, and to get rid of a competitor in said business; and that but for the attachment the plaintiff would have made a profit of $200 from his business, between the date of the attachment and that of his writ of replevin.

The causes of demurrer were, that the judgment in replevin against the attaching officer was a bar to this suit; that the damage to the goods while attached gave no cause of action against the defendant; and that the claim for relief (which was for damages) was not supported by the facts alleged. The record of the cause showed an entry of "demurrer sustained, *Elmer, J.*," on November 30th, 1897. The judgment was dated December 31st, 1897, and after stating that the court found the issue for the defendant on November 30th, set forth that "said action came thence to the present time, whereupon it is adjudged by this court that the defendant recover of the plaintiff his costs, taxed at $."

The defendant pleaded in abatement of the appeal, that the decision of the Superior Court sustaining the demurrer was duly made and filed on November 30th, and that afterwards the plaintiff, on December 31st, 1897, upon his own motion, caused said court to enter up a judgment of said date; and that the appeal was not taken within ten days from November 30th, but only within ten days from the judgment of December 31st.

The plaintiff moved orally in this court that the plea in abatement be not entertained, because it was filed with the clerk of the Supreme Court of Errors for New Haven county, when the appeal was from a judgment rendered in Fairfield county, and therefore the plea should have been filed with the clerk of the court for Fairfield county; and also because the allegations of the plea contradicted the record and judgment of the Superior Court.

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This motion was denied, and a demurrer was then filed to the plea in abatement, which demurrer was sustained, and the appeal then heard on its merits.

Henry A. Purdy, for the appellant (plaintiff).

Judgment in this case was rendered on December 31st, 1897; and the fact that there had been a previous hearing and decision upon the demurrer does not affect the plaintiff's right of appeal. *Megin* v. *Filor*, 4 Fla. 203; *Betton* v. *Williams*, 1 id. 11; *Ætna Ins. Co.* v. *Swift*, 12 Minn. 326; *Kellar* v. *The State*, 71 Amer. Dec. 596. The judgment sustaining or overruling a demurrer is not final. *Chester* v. *Leonard*, 68 Conn. 504. The plaintiff had the right to elect to stand upon his demurrer, and to ask that a final judgment might be rendered from which he could appeal. *O'Donnell* v. *Sargent & Co.*, 69 Conn. 476. In order that a former judgment may be held to be a bar to the prosecution of a second action, four identities must concur: first, identity of the thing sued for; second, identity of the cause of action; third, identity of the persons and parties of the action; fourth, identity of the quality of the persons for or against whom the claim is made. *Lyon* v. *Perin & Geff M'f'g Co.*, 125 U. S. 698; *Hungerford's Appeal*, 41 Conn. 322; *Anderson* v. *Gregory*, 43 id. 61; *Carver* v. *Staples*, 52 id. 21; *Lovell* v. *Hammond*, 66 id. 500; *Fuller* v. *Met. Life*, 68 Conn. 55; *Miles* v. *Strong*, ibid. 273. In the action of replevin the plaintiff could not have recovered damages for the injury complained of in this complaint, and even if he could the two actions are for different causes, and where the causes of action are different the plaintiff is not bound to join them in one action, though he may do so. *Eastman* v. *Porter*, 14 Wis. 42; *La Montague* v. *Howe*, 84 id. 333; *Merritt* v. *Tariffville M'f'g Co.*, 10 Conn. 388. In New York an action of replevin and an action for damages to the property are treated as different causes of action. Code of Civil Proc. § 1722. The same rule appears to be applied in Indiana and Kentucky. *Baal* v. *Stewart*, 109 Ind. 371; *Pharis* v. *Carver*, 13 B. Mon. 236. The parties to the different suits are not the same. The defendant in the replevin suit

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and the defendant in this suit are two different persons, though they may both be guilty of the same wrong, and liable as joint tort feasors. But a judgment against one while the same remains unsatisfied, is no bar to an action against the other, even upon the same cause of action. *Sheldon* v. *Kibbe*, 3 Conn. 214; *Morgan* v. *Chester*, 4 id. 388; *Atwater* v. *Tupper*, 45 id. 146. The action of replevin is purely statutory, and the statute must be strictly followed. *Spencer* v. *Bidwell*, 49 Conn. 62.

James H. McMahon, for the appellee (defendant).

The appeal was not taken within the time prescribed by statute, if based upon the decision sustaining the demurrer. If based upon the final judgment, the plaintiff cannot appeal because that judgment was rendered at his request. *Schmidt* v. *Oregon, etc., Co.*, 28 Or. 9; *Nowegian Plow Co.* v. *Bollman*, 47 Neb. 186; *Walter* v. *Chicago, etc., Ry. Co.*, 56 Fed. Rep. 1006; *Erlanger* v. *So. Pac. R. Co.*, 109 Cal. 395; *Scateua* v. *Cal. Canning Co.*, 115 id. 14. The plaintiff seeks damages in this suit for the same taking and detention by the officer, for which recovery and satisfaction has already been had against the officer. This he cannot do. There is an absolute identity in the original cause of action in both suits. 2 Black on Judg. 738. When a party brings an action for a part only of an entire indivisible demand, and recovers judgment, he is estopped from subsequently bringing another action for another part of the same demand. *Bartels* v. *Schell*, 16 Fed. Rep. 341; *Firemen's Ins. Co.* v. *Cochran*, 27 Ala. 228; *Lawrence* v. *U. S.*, 8 U. S. Court of Claims, 252; *Damon* v. *Denny*, 54 Conn. 256; *Ross* v. *Weber*, 26 Ill. 222; *Matthias* v. *Cook*, 31 id. 83; *Kaehler* v. *Dobberpuhl*, 60 Wis. 256, 262; *Stevens* v. *Tuite*, 104 Mass. 328, 334. The defense of satisfaction, etc., is disclosed by the complaint, so that the demurrer will lie. Abbott's Trial Brief on the Pleadings, page 119, § 127 and cases cited; *Perkins* v. *Rogers*, 35 Ind. 124.

BALDWIN, J. The appellee filed a plea in abatement with

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the clerk of the Supreme Court of Errors for New Haven county on the Friday preceding the first day of the January term of the court to be held at New Haven, in the third judicial district, to which term the appeal had been taken. The appellant moved that the plea be stricken from the files, because it was not filed with the clerk of the court for Fairfield county. This motion was denied, and the point of practice thus decided is of such importance that the court deem it proper to state the reasons which led to that result, particularly as in another appeal from Fairfield county at the same term, a similar plea was entertained, against the objection of the appellant, which had been filed with the clerk of the court for Fairfield county.

The secretary of the State was the sole clerk of this court from its original institution in 1784, until 1819. During this period it sat only at the capital of the State. In 1819 a law was passed that one term should be held annually in each county, and that "the clerks of the Superior Courts in the several counties, shall be clerks of the Supreme Court of Errors in their respective counties." Stat. Rev. of 1821, p. 137, § 2. In 1866, "to facilitate the trial of causes before the Supreme Court of Errors," the State was divided into four judicial districts, each containing two counties, and in each of which the court was to hold two terms a year, and it was provided that the court "shall have and exercise the same powers, authority, and jurisdiction in each judicial district, which it has hitherto had and exercised in the counties of which such district is constituted." This statute also declared that "the clerks of the Superior Court in the several counties shall be clerks of the Supreme Court of Errors for their respective counties in the judicial districts to which such counties belong." Public Acts of 1866, p. 43, Chap. 75. In 1889 the third judicial district was reconstituted so as to be "composed of the counties of New Haven and Fairfield," the court to sit twice a year at New Haven and twice a year at Bridgeport, and it was further enacted that "the clerk of the Superior Court for New Haven county shall keep a docket upon which all appeals to be heard by the Supreme Court

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of Errors in New Haven shall be entered in the following order: first, appeals from Fairfield county; second, appeals from New Haven county. The clerk of the Superior Court for Fairfield county shall keep a docket upon which all appeals to be heard by the Supreme Court of Errors in Bridgeport shall be entered in the following order: first, appeals from New Haven county; second, appeals from Fairfield county." Public Acts of 1889, p. 77, Chap. 141.

The Supreme Court of Errors is a court whose jurisdiction is co-extensive with the State. Each of its eight clerks (that is, the clerk for each county) is, as such, a State officer, and the court could require his attendance, in case of necessity, at any of its sessions, whether held within or without the particular county in which its files and records are regularly in his keeping.

It being made by law the duty of the clerk for New Haven county to prepare the entire docket for those terms of the court for the third judicial district which are held at New Haven, it has not been our custom to require the attendance at those terms of the clerk for Fairfield county. The clerk for New Haven county is, for the purposes of that term, the clerk of the court for the entire district.

Causes may be heard, at such a term, transferred by consent from counties belonging to other districts. It is the duty of the clerk in attendance to note such orders as the court may make in any causes, upon its docket, without regard to the county from which they come. It is also his duty to communicate to the clerk of this court in each county, whatever judgments may be rendered in causes originating there; for it is there that the final record of the cause is completed and preserved. The clerk who has charge of the docket of a district, at any term, is placed in that position to facilitate the disposition of the causes entered. He is the only clerk of the court with whom to file original papers presented during the term for the consideration of this court.

By a recent statute, it is required that pleas in abatement, which heretofore have been filed on the first day of the term,

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shall be filed on or before the Friday preceding such day. Public Acts of 1897, p. 895, § 30. Under the previous practice, such pleas were filed with the clerk of the court in and for the district within which the cause was pending for consideration. His functions as clerk of the court for the district commence before the opening of the term, for the docket must be prepared in advance. If, before it is made up, a plea in abatement or other original paper is filed in any of the causes to be entered, that fact should be noted on the docket as printed, and the paper immediately printed also. It is therefore proper to file it with him, although the cause may come up from a county in which he is not acting as the clerk of the court; for it is thus brought soonest to his notice. But it does not follow that to file it with the clerk of the court for such other county would be improper. Each of these clerks is equally a clerk of this court, and each has certain clerical duties to perform with reference to the cause. One prepares it for entry upon the docket; the other makes the entry and retains charge of it until it becomes the subject of a final adjudication, or is continued to another term.

As soon as an appeal in ordinary course is perfected, the cause passes under the control of this court, and is pending here. *Huntington* v. *McMahon*, 48 Conn. 174, 195. Until the opening of the term to which the appeal is taken, any original papers, entitled in this court, may be filed either with the clerk for the county in which the judgment appealed from was rendered, or with the clerk for the county in which the term is to be held. Each is a clerk of the court having cognizance of the cause; one acting as the permanent custodian of its files and records for the county whence the appeal is brought, and the other as the temporary custodian of such of those files and records as relate to this appeal and come into his hands in his capacity as, for the time being, the acting clerk for the district, to facilitate the preparations for the hearing, or the proceedings incident to the hearing itself.

The plea in abatement in the case at bar set up that the appeal was not taken within the ten days allowed by statute

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after the rendition of the final judgment. This contention rests upon the ground that an entry by order of court, that a demurrer to the complaint is sustained, is such a judgment; notwithstanding the record shows a judgment in form, based upon such a ruling, which was rendered a month later, and upon which the appeal is predicated.

The General Rules of Practice provide that in all actions the judgment shall be formally written out, under an appropriate caption entitled as of the day on which is entered, and signed by the clerk or judge as the case may be. 58 Conn. 586, 587. The date of its entry is often subsequent to that of the decision from which it results. Such was the case in the present instance, and the fact that it was the losing party on whose motion the entry was formally made, did not convert it into a consent decree. The defendant having neglected to prepare the judgment file, or to ask the clerk to do so, the plaintiff was under the necessity of making the motion, in order to found the appeal, which he desired to take. He was not bound to avail himself of his statutory right to plead over, if he preferred to stand on his original complaint. *O'Donnell* v. *Sargent & Co.*, 69 Conn. 476.

For these reasons, the plea in abatement is insufficient and was overruled.

We now come to the consideration of the appeal upon its merits. The single question presented is whether, if a man whose goods are maliciously attached upon a writ against a third party, replevies them from the officer and subsequently recovers judgment against him in the replevin suit, that judgment necessarily bars any subsequent action against the original plaintiff who wrongfully directed such attachment, for damages resulting from that act.

In case of a wrongful attachment, replevin, under our statutes, may be brought either against the officer or the plaintiff in the attachment suit, or both, to recover the goods, together with the damages from their wrongful detention. General Statutes, p. 308, §§ 1323, 1325, 1327.

The plaintiff in this case elected to sue the officer alone, and presumably recovered from him full damages for the

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wrongful detention of the goods replevied. But such detention was not the only wrong of which he could complain. The original taking by attachment was, on the part of the present defendant, a malicious abuse of legal process, designed to drive a competitor in business from the field, and achieving a temporary success. Against the officer no malice or improper motive is charged. He could therefore be held to answer in damages only to the extent required to compensate the plaintiff in replevin for the actual pecuniary loss, necessarily involved. *Oviatt* v. *Pond*, 29 Conn. 479; *Morey* v. *Hoyt*, 62 id. 542. The plaintiff in the attachment, on the other hand, may be liable for consequential, and perhaps for vindictive damages. *Watson* v. *Sutherland*, 5 Wall. 74, 79; *Merrills* v. *Tariff M'f'g Co.*, 10 Conn. 384. The causes of action were different and distinct.

Nor does it appear from the complaint that the plaintiff has collected whatever damages may have been awarded in the replevin suit. The officer and the party under whose directions he acted were joint trespassers. Their liability was joint and several, and an unsatisfied judgment against one for the damages resulting from the trespass, would be no bar to a later suit for the same damages against the other. *Sheldon* v. *Kibbe*, 3 Conn. 214; *Lovejoy* v. *Murray*, 3 Wall. 1. The complaint was therefore sufficient on its face, and the demurrer should not have been sustained.

There is error in the judgment appealed from.

In this opinion the other judges concurred.

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MARIA GUINAN'S APPEAL FROM PROBATE.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and PRENTICE, Js.

The delivery of a bank book by the owner to the donee, with the intent that the latter should take the title to the money represented therein, is a sufficient delivery to constitute a valid gift of the money.

The appellee claimed title to a savings bank deposit of which she had obtained possession as a gift. She had been appointed administratrix on the estate of the donor and had receipted for the deposit in her name as administratrix. *Held*, notwithstanding this fact, that she was not estopped to show that her appointment as administratrix was applied for and granted to enable her the more readily to appropriate the bank deposit to her own personal use.

[Argued January 20th—decided February 8th, 1898.]

APPEAL from an order and decree of the Court of Probate for the district of Waterbury accepting the final administration account on the estate of Kate Healy, deceased, taken to the Superior Court in New Haven County and tried to the court, *Hall, J.;* facts found and judgment rendered in favor of the appellee, and appeal by the appellant for alleged errors in the rulings of the court. *No error.*

The Court of Probate in the district of Waterbury appointed Winifred Miller administratrix on the estate of Kate Healy, who had died intestate in that district. On the 24th day of April, 1897, pursuant to an order of notice by said court to all persons in interest, and duly complied with, she settled her administration account, which was accepted, allowed and approved by the said court. From the order and decree of that court approving and allowing the account, Maria Guinan appealed to the Superior Court, and assigned the following as her reasons of appeal:—

"1. Said Kate Healy, the decedent, was at the time of her death the owner of certain jewelry, clothing, two trunks, one satchel, and about $1,200 in cash which was deposited in part in the Derby Savings Bank, at Derby, Conn., in part

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in the Ansonia Savings Bank, at Ansonia, Conn., and in part in the Waterbury Savings Bank, at Waterbury, Conn. 2. After her appointment as administratrix on the estate of Kate Healy, said Winifred Miller did, as said administratrix, demand and receive said $1,200 from said banks. 3. Said Winifred Miller, administratrix as aforesaid, did neglect and refuse to make any account of said $1,200 as a part of the estate of said Kate Healy in said administration account, or charge herself with the same or any part thereof; but on the contrary did in said administration account represent said estate as without any assets whatsoever. 4. Said $1,200 was at the time of the death of said Kate Healy, and ever since has been and still is, a part of the estate of said Kate Healy, and should have been included in said administration account and charged therein against said Winifred Miller as administratrix."

The appellee, the said Winifred Miller, for defense to these reasons of appeal, answered: "Paragraphs 1, 2, and 4 of the appellant's reasons of appeal are denied. Paragraph 3 of said reasons of appeal is admitted."

The Superior Court found the issue for the appellee, and rendered judgment that the said order and decree of the said Court of Probate be affirmed with costs. The appellant, Maria Guinan, now appeals to this court. The finding of facts is this: "1. Kate Healy, of Waterbury, died intestate at Naugatuck, on the 4th of April, 1896, of pneumonia. 2. Unless upon the facts hereinafter stated, the $1,200 which at the time of her death was on deposit in her name in the Derby Savings Bank, the Ansonia Savings Bank, and the Waterbury Savings Bank, is to be regarded as a part of her estate, she left no estate, excepting a few articles of wearing apparel and personal property, of no value. 3. The said Kate Healy, who was unmarried, left surviving her a brother, residing in Massachusetts, a sister Maria Guinan, the appellant, wife of Patrick Guinan, of Shelton, a sister Winifred Miller, wife of Charles Miller, of Waterbury, and Thomas Bergen, of Ansonia, who is a child of a deceased sister. 4. Said Kate Healy had for many years worked as a servant

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girl and the $1,200 was money she had saved from her earnings, and had deposited in said banks. 5. When out of employment or unable to work, she had made her home with her sister, Winifred Miller, for whom she had a greater affection than for her other relatives, and who for many years she had intended should have her money upon her death. She had so lived with her sister Winifred several years in all, without paying board. 6. Said Kate Healy at the time of her death was visiting a Mrs. Lavigne, for whom she had worked. She left the house of her sister, Mrs. Miller, at Waterbury, on Wednesday, April 1st, and died on the following Saturday. The physician who attended her at the house of Mrs. Lavigne on Wednesday, April 1st, found she had pneumonia, and on the following day Kate Healy caused her sister, Winifred Miller, to be sent for. 7. Mrs. Miller in company with a friend, Mrs. Caulfield, arrived Thursday evening, April 2d. While they were alone with Kate Healy in the room where she was sick in bed, Kate Healy took the three bank books in question from under her pillow and gave them to the said Winifred Miller; and also gave to her the keys of her trunks, which she took from a small satchel. 8. In giving these articles to Mrs. Miller, Kate Healy said: 'Those bank books I give to you, and the keys to my trunks. These are yours, and everything I got belongs to you. If anything happens to me I want you to have everything.' 9. I find that at the time of making said gifts to Mrs. Miller the said Kate Healy was in the expectation of immediate death, and that in making said gifts she intended that the same should take effect immediately, as absolute gifts of said bank books and of the said money in said savings banks. 10. Soon after the death of Kate Healy, Mrs. Miller with said bank books applied at said savings banks for the money credited upon said books, but was informed by the several cashiers that the money could only be paid to a duly appointed administrator or administratrix upon Kate Healy's estate; and one of said cashiers, to whom she had told the circumstance of said gift, advised her, as the proper way to get said money, to see the judge of probate and take out

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letters of administration. 11. Mrs. Miller thereupon, on the 8th day of April, applied for letters of administration, and informed the judge of probate that said bank books had been given to her by her sister, and of all the circumstances. The judge of probate advised her to consult an attorney before taking out administration, and went with her to the office of the late D. F. Webster. After having laid all the facts before her said counsel, Mr. Webster, she was advised by him that the easiest way for her to get her money, without a lawsuit, was to apply to be herself appointed administratrix. 12. Acting upon such advice, and for the sole purpose of procuring for herself said money, which she was advised and believed belonged to her, she applied to be appointed, and on the 14th of said April was appointed administratrix of said estate, and gave bonds to the amount of $1,200. 13. Upon furnishing proof of her said appointment to said banks said moneys were paid over to Mrs. Miller, and she receipted for the same as such administratrix. 14. No appraisers were ever appointed on said estate, nor was any inventory ever filed. 15. On the 24th of April, 1897, said Winifred Miller filed her final account, in which she represented said estate consisted of no property. 16. Said account was accepted and approved by said Court of Probate. 17. Upon the trial of said case in this court, counsel for the appellant objected to the evidence offered by the appellee, of the declarations of the deceased Kate Healy made prior to said 2d of April, 1896, as to her intention to give said money to said Mrs. Miller. The court overruled the objection and admitted said evidence, and the appellant excepted to said ruling. 17½. Counsel for the appellant objected to proof of the conversation between the judge of probate and Mrs. Miller, referred to in section 11 of this finding. The court overruled the objections, and permitted proof of said conversation for the purpose of showing why the said Mrs. Miller was appointed administratrix, and why as administratrix she drew said moneys from the banks. The appellant duly excepted to said ruling. 18. Upon said facts the appellant claimed: (*a*) That there was no such expectation of death

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upon the part of said Kate Healy as would render said gift of said savings bank books and said money valid as a gift *causa mortis;* and that said facts did not constitute a valid gift *inter vivos* of said money in said savings banks. (*b*) That upon the facts aforesaid the said Winifred Miller was estopped from setting up in herself any title to said bank books, or said moneys in said banks. (*c*) That the alleged gift was invalid, in that it was contrary to the testamentary laws of this State, being an attempt to dispose of all the estate of the deceased person by parol. The court held upon said facts that there was a valid gift of said bank books and said money in said banks, and that the said Winifred Miller was not estopped from setting up her title thereto in this action."

V. Munger and *Ernest L. Staples*, for the appellant.

Having made use of the Court of Probate for an illegal purpose, Mrs. Miller is now estopped from denying the capacity in which she acted in procuring the money. As between herself and the public, and especially as against these appellants, she must be judged by her acts, not her motives. 7 Amer. & Eng. Ency. of Law, 28; *Benjamin* v. *Gill*, 45 Geo. 110; 1 Per. Tr. § 260; Lew. Tr. 325; *Mariegault* v. *Deas*, 1 Bail. Ch. (S. Car.) 283; *Ruth* v. *Owens*, 2 Rand. (Va.) 507; *Attorney General* v. *Munro*, 2 DeG. & Sm. 163. The evidence offered by Mrs. Miller as to her statements and declarations to the judge of probate, was inadmissible. They were time-serving declarations made in her own interest in the absence of the heirs. It was not competent for Kate Healy to dispose of all her estate in the manner described. Thorn. Gifts & Adv. § 41; *Headley* v. *Kirby*, 18 Pa. St. 326; *Marshall* v. *Berry*, 13 Allen, 43.

Edward F. Cole, for the appellee.

The evidence offered by the appellee of the declaration of the deceased made prior to April 2, 1896 (the date of the gift), was relevant and material. *Meriden Sav. B.* v. *Wellington*, 64 Conn. 553. Evidence of the conversation between Mrs. Miller, the judge of probate and her lawyer, Mr. Web-

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ster, in relation to taking *her* money out of the several banks, was competent to show why she was appointed administratrix, and why as said administratrix she drew the money from the banks as her own money and not as money belonging to Kate Healy's estate. *Northford Rivet Co.* v. *Blackman Mfg. Co.*, 44 Conn. 186. The act of the appellee in getting herself appointed administratrix, for the sole purpose of getting her own money, did not injure the appellant. Estoppels are odious and will not be applied except to promote the ends of justice. *Brown* v. *Wheeler*, 17 Conn. 346; *Mowry* v. *Hawkins*, 57 id. 454; 6 Wait, Act. & Def. 681, 682.

ANDREWS, C. J. There are various reasons of appeal set down in the record. There is, however, but one real question: Was there a valid gift of the money from Kate Healy to Winifred Miller, so that the money belonged to her, and not to the estate? The Superior Court decided that there was.

A gift is the transfer of property without consideration. It requires two things: a delivery of the possession of the property to the donee, and an intent that the title thereto shall pass immediately to him. This is a gift *inter vivos*. In such a gift the donee takes an absolute, indefeasible title. A gift *causa mortis* differs from a gift *inter vivos*, in that the donee takes a present title liable to be divested on the recovery of the donor. If the donor dies then the effect of the gift is the same as in the case of a gift *inter vivos*.

It will not be denied that the delivery of the bank books by Kate Healy to Winifred Miller, if the intent existed that Mrs. Miller should take the title to the money represented therein, would be a sufficient delivery to make a valid gift of the money. *Camp's Appeal*, 36 Conn. 88; *Minor* v. *Rogers*, 40 id. 512; *Buckingham's Appeal*, 60 id. 143: *Tillinghast* v. *Wheaton*, 8 R. I. 536; *Keniston* v. *Sceva*, 54 N. H. 24; *Ridden* v. *Thrall*, 125 N. Y. 572; *Alger* v. *North End Savings Bank*, 146 Mass. 418; *Cain* v. *Moon*, 2 Q. B. 283 (1896); *Basket* v. *Hassell*, 107 U. S. 602.

The appellant claims that Mrs. Miller is estopped to deny

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that the money belonged to the estate of Kate Healy. The claim is, that having received the money as administratrix she cannot be allowed to set up a title to it herself. This claim really begs the question. Mrs. Miller insists that she did not receive the money as administratrix at all; that all the time she claimed to own it herself. The trial court sustained her claim. The fact that she gave receipts for the money, which she signed as administratrix, was a very strong circumstance against her claim, but it was not conclusive. It was for the trial judge to weigh.

All the evidence which was objected to we think was admissible, either to show the delivery of the bank books or the intent with which Kate Healy made the delivery to Mrs. Miller.

There is no error.

In this opinion the other judges concurred.

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ANNA SCHROEDER *vs.* EDWARD D. TOMLINSON.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

To a complaint issued and dated March 27th, 1897, a summons signed by a justice of the peace was annexed, dated *October 27th, 1897*, commanding the defendant to appear and answer on the 3d day of April, 1897. *Held* that the action was not abateable by reason of the error in the date of the summons.

In an action of summary process to recover leased premises because of a subletting by the tenant, the complaint failed to aver that such subletting was without the written consent of the lessor or his assigns, as provided in the lease. *Held* that the omission was a defect of form and not of substance.

Proceedings for taking land upon execution are *stricti juris*, and no title passes unless the statute is exactly pursued.

The title of an execution creditor in the land of his debtor is not perfected, as against third persons, until the execution proceedings have been returned and recorded in the land records, as required

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by General Statutes, § 1184. And although the creditor's title, when duly perfected, ordinarily relates back to the first step in the process, this legal fiction will not be permitted to work injustice to a *bona fide* purchaser of land whose deed is recorded during the pendency of the execution proceedings.

The levy of an execution upon land, in respect to the rights acquired by the creditor, does not speak from its date in the same manner as a levy of attachment.

A life tenant cannot acquire title to the premises by adverse possession, against the owner of the reversion, since his occupancy is justified under his paramount title.

Under our statute (§ 1358) the grantee of leased premises succeeds to the lessor's remedy of summary process for a forfeiture of the lease.

[Argued January 21st—decided February 8th, 1898.]

WRIT of error to reverse the judgment of a justice of the peace in an action of summary process, brought to the Court of Common Pleas in New Haven County and reserved by that court, upon an agreed statement of facts, for the consideration and advice of this court. *No error.*

The complaint, after reciting a lease from Theodore King to the plaintiff in error, in 1869, for her life, for a residence only for herself, she covenanting not to assign the lease or underlet or otherwise dispose of all or any part of the premises without his written permission, and that if she should the lease should thereupon expire, and summary process lie to repossess the lessor, without any re-entry, alleged that in 1892 she did underlet to parties unknown to the defendant in error; that in 1896 she leased the premises to another party, who was now in possession; that in 1870 she married and lived on the premises with her husband until 1885, when he died; and that in 1871 the lessor conveyed the reversion to the defendant in error, who now owned it.

The summons annexed to the complaint was dated October 27th, 1897, and required the plaintiff in error to appear before the justice on April 3d, 1897. She appeared and pleaded in abatement that he had no authority to issue the summons so dated. This plea was overruled and she then answered, and the cause was finally tried before a jury. The bill of exceptions showed that she requested the justice to give

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certain instructions to the jury which were refused, and a verdict was rendered against her, followed by a judgment of dispossession. She then brought a writ of error to the Court of Common Pleas, and the parties there stipulated as to the essential facts, which are sufficiently stated in the opinion.

John Elliott, for the plaintiff.

The levy of execution on March 30th, 1872, was valid. Gen. Stats. §§1182, 1184; *Quinnebaug Bk.* v. *French*, 17 Conn. 135. The true title of real estate must appear of record, to be valid against others than the grantor and his heirs; *French* v. *Gray*, 2 Conn. 109; *North* v. *Belden*, 13 id. 380; *Hart* v. *Chalker*, 14 id. 79; *Smith* v. *Vincent*, 15 id. 14; *Bush* v. *Golden*, 17 id. 601; therefore, so far as the creditors were concerned, the true title to the property was in the record owner, King. *Barnum* v. *Landon*, 25 Conn. 149. The appraisal was properly made. *Scripture* v. *Johnson*, 3 Conn. 213; *Hobart* v. *Frisbie*, 5 id. 594. The appraisers are to appraise the value of the debtor's interest taken, not the value of the land. *Beers* v. *Botsford*, 13 Conn. 151. Upon recording the execution the creditor's title relates back to the date of the levy, and no intermediate conveyance by the debtor can defeat the execution title. Gen. Stats. §1184; *Kellogg* v. *Wadhams*, 9 Conn. 208; 20 Amer. & Eng. Ency. of Law, 727, *n.* 4, and cases cited; *Coe* v. *Stow*, 8 Conn. 438. The Tomlinson deed could be valid against creditors only from the date of record, April 1st, 1872. Gen. Stats. §2961; *Barnum* v. *Landon*, 25 Conn. 149; Tied. on Real Prop. 817 *a*; *Smith* v *Starkweather*, 2 Day, 207, 210; *Davenport* v. *Lacon*, 17 Conn. 283.

V. Munger, for the defendant.

Tomlinson is entitled to judgment by virtue of his deed from King. That deed was dated Jan. 10th, 1872, and was recorded April 1st, 1872. The execution was not recorded till April 3d, 1872. On that day the record title stood in Tomlinson. The plaintiff in error, however, insists that because the levy was made March 30th, 1872, that the title re-

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lates back to that date. This court has decided otherwise. *Coe* v. *Stow*, 8 Conn. 536. A title derived by an execution levy must conform in all respects to the statute. The execution must not only be recorded in the town clerk's office, but must be returned to the court from whence it issued. This was not done until April 12th, 1872. *Kellogg* v. *Wadhams*, 9 Conn. 201. Mrs. Schroeder obtained nothing by her execution levy. At that time she had a life estate in the premises. Assuming that King had a title that was subject to a levy, it was encumbered by the life estate. In setting off King's interest by the levy, that life estate should have been appraised. This was decided in the case of *Fish* v. *Sawyer*, 11 Conn. 545. The plaintiff in error cannot assert a title acquired by adverse possession. She cannot claim adversely against a remainder man, until the termination of the life estate. *Chandler* v. *Phillips*, 1 Root, 547; 1 Amer. & Eng. Ency. of Law, 237; *Fleming* v. *Burnham*, 100 N. Y. 1; *Stephens* v. *Winthrop*, 1 Pick. 318. The plea in abatement was properly overruled. The date of the writ was a clerical error. The plaintiff was not misled by it. The court, the parties and the cause of action were fully understood.

BALDWIN, J. The original action was not abateable by reason of the error in the date of the summons. General Statutes, § 1000.

It is claimed that the complaint was insufficient for want of an allegation that the underletting by the plaintiff in error was without the written consent of the lessor or his assigns, and that this omission was reached by a demurrer interposed before the justice of the peace, to the second reply to the second defense, on the principle that a demurrer searches the whole record and attaches ultimately to the first substantial defect. The second reply set up an assignment of the reversion in 1872, by deed pursuant to a previous contract recorded in 1871, to the defendant in error; and the second defense was rested on a title in the plaintiff in error by levy of execution on the interest of the lessor, prior to the record of such deed. Under our statutory rule that all demurrers shall

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distinctly specify the reasons why the pleading demurred to is insufficient, it is, to say the least, doubtful whether a demurrer to a reply for one cause can ever call for a judgment that the complaint is insufficient for another cause. In the case at bar, however, the defect in the complaint was one of form, not substance. It was a defective statement of title, but not a statement of a defective title. Even at common law, therefore, it would not have been reached by the demurrer in question.

The substantial controversy between the parties was as to the present ownership of the reversion. The plaintiff in error, Mrs. Schroeder, received the life lease recited in the complaint from her son Theodore King, in 1869. Upon her marriage in 1870, he brought an action of summary process against her, on the ground that the marriage, and the occupation of the premises by her husband with her, worked a forfeiture; and recovered judgment. She brought a writ of error to the Court of Common Pleas and prevailed. Pending a motion in error to this court, which was afterwards decided against him (*Schroeder* v. *King*, 38 Conn. 78), he sold and conveyed to Tomlinson, the present defendant in error, a lot adjoining the demised premises, and on the same day made a written contract with him, stating that in consideration of such purchase, and "the further consideration of the taxable costs and counsel fees incurred and to be incurred in a suit now pending for the recovery of the possession of the premises hereinafter described, which the said Edward D. Tomlinson hereby agrees to pay as a part consideration of the purchase of said premises, the said Theodore has agreed and does hereby agree that upon the termination of said suit and the payment of the taxable costs and counsel fees as aforesaid, or at any time before said termination, at the election of the said Edward D. Tomlinson, and upon his, the said Tomlinson's, paying the costs and counsel fees in said suit up to the date when he, the said Edward D. Tomlinson, may choose to accept a conveyance of the premises as hereinafter described, and pay said costs and fees as above, he the said Theodore King will execute and deliver to the said Edward

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D. Tomlinson a quitclaim deed conveying all his present interest in" the premises then occupied by his mother under her lease. Tomlinson also signed this contract, agreeing "to accept said deed and conveyance of said premises, and pay said taxable costs and counsel fees in the manner above specified." It was executed, attested, and acknowledged on January 5th, 1871, in the same manner as a deed of land, and recorded in the land records of the town where the premises were situated, on January 18th.

Subsequently, upon the affirmance of the judgment in favor of Mrs. Schroeder, she took out an execution upon it, and on March 30th, 1872, the officer levied it on King's interest in the demised premises. His return stated that he levied upon the land and the debtor's interest therein, said land being subject to the incumbrance of a lease to Mrs. Schroeder during her life; that certain appraisers were duly appointed, one by the creditor and two by a proper magistrate, to appraise said land with the incumbrances thereon; that after viewing it, "and ascertaining in view of the incumbrances thereon," they appraised "the equity, right and interest of said debtor in said premises, subject to the life lease of Anna Schroeder, at the sum of thirty dollars," and delivered to him a certificate of such valuation, which was annexed; and that on said day he set off to her the whole of said land in part satisfaction of the execution. Appended to the return was the magistrate's certificate that he had appointed two appraisers, who were named, to act with the appraiser named by Mrs. Schroeder in appraising the value of the land and the debtor's interest therein, subject to her life lease, and that all three had been duly sworn before him. Then followed the certificate of the appraisers, which stated that they "having been appointed and sworn, as above specified, to appraise the above piece of land to be set off on said execution, did appraise the same at the sum of thirty dollars."

On January 10th, 1872, King had conveyed the demised premises to Tomlinson, by a quitclaim deed of that date, purporting to be given in pursuance of their contract on record, and on April 1st Tomlinson lodged this deed for

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record. On April 3d the officer caused the execution and his return thereon to be recorded in the land records, and on April 12th returned it to the office of the clerk of the court whence it issued.

Prior to March 30th, Mrs. Schroeder had no notice of any claim of ownership by Tomlinson, except so far as General Statutes, § 2964, might make the record of his contract with King "notice to all the world of the equitable interest thus created." Ever since that date she has claimed and exercised absolute ownership over the land and has expended large sums in improvements upon it, under the belief that she was the sole owner. In 1892 she underlet it to tenants who have since been in possession under her. Tomlinson never paid her anything upon her judgment for costs against King. He has ever since the record of his deed on April 1st, 1872, claimed to own the land, subject to the life estate of Mrs. Schroeder, nor did he ever have knowledge that she claimed anything under her levy of execution, but always supposed her occupancy and claim to be solely under her lease.

Our statutes provide that all executions duly levied on land, and returned and recorded, shall vest all the title of the debtor in the creditor, and his heirs and assigns. General Statutes, § 1184. The parties are at issue on two questions: first as to whether the execution was duly levied; and second, as to whether the proceedings under it were affected by the record of Tomlinson's deed on April 1st.

The objection to the validity of the levy is that the appraisal was not of the value of the debtor's interest in the land, that is, of the reversion, but of the land itself. The terms of the appraisers' certificate support this contention, and unless it can be controlled by their reference to the oath which they had taken to appraise it subject to the lease, the legal basis for setting it off at thirty dollars is wanting. Such proceedings are *stricti juris*, and no title passes unless the statute is exactly pursued. *Fish* v. *Sawyer*, 11 Conn. 545. We find it, however, unnecessary to decide this question.

At the date of the levy, King owned the legal title to the

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reversion in the demised premises, so far as concerned Mrs. Schroeder. Tomlinson had acquired this title more than two months before, but by a conveyance which was ineffectual, except as to King and his heirs, unless recorded. General Statutes, § 2961. The same policy, however, which demands the record of a deed, has dictated a similar requirement in case of a levy of execution. A levy on land followed by a set-off occupies the place and serves the purpose of a conveyance. Standing alone, it is not even an inchoate transfer of title, except as against the judgment debtor and those identified in position with him. The execution creditor must not only see that due return is made to court, but, like a grantee by deed, must place that under which he claims on record within a reasonable time; and any delay is at the risk of being postponed by a prior record of some other evidence of title, derived from the execution debtor by another. He is held to stricter obligations in this particular than the holder of an ordinary conveyance, since the levy is inoperative to effect a transfer of title, even against the judgment debtor, unless, and until, the proceedings are recorded, and recorded within the life of the execution. *Coe* v. *Stow*, 8 Conn. 536. It is true that under a levy duly perfected the title of the creditor commonly relates back to the first step in the process; but this legal fiction is never permitted to work injustice to a *bona fide* purchaser, in whom any rights may have meanwhile become vested. Tomlinson stood in such a position. He purchased the reversion, and took a proper conveyance of it, more than two months previous to the levy, in pursuance of a contract made and recorded nearly a year before. His deed was a quitclaim, but this, under the principles of our system of conveyancing, does not make his rights any less than if it had contained full covenants of warranty. *Robinson* v. *Clapp*, 65 Conn. 365, 382. By the contract of January, 1871, he was bound to accept it whenever tendered after the termination of the suit between King and his mother, and thereupon, as part of the consideration of the conveyance, to pay "the taxable costs and counsel fees incurred" in that action. The other part of the consid-

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eration he had previously discharged by purchasing of King the adjoining lot for $1,500. The costs and fees, described in the contract, were evidently those which might be due from King; and Tomlinson's duty was to pay the money necessary to satisfy them to King, to enable him to discharge his obligations to his creditors. The quitclaim deed was given after the end of the suit mentioned in the contract, and the consideration clause recites a payment of $200, which there is nothing in the record to contradict. Tomlinson acquired title, therefore, as a *bona fide* purchaser, and while he failed to record his deed within a reasonable time, this did not impair his right to perfect his title by a subsequent record, except as against some other purchaser of greater diligence. It was recorded on April 1st, two days before the record of the proceedings upon the execution. This priority of record, had his deed been taken after the commencement of the levy, would *prima facie* have given him priority of title, to be defeated only by proof that he was guilty of fraud or that which is equitably equivalent to fraud. *Wheaton* v. *Dyer*, 15 Conn. 307; *Bush* v. *Golden*, 17 id. 594, 602. Much more is he entitled to insist on priority, when his conveyance long preceded the levy.

Knowledge of the existence of an unrecorded deed may be a sufficient ground for the imputation of constructive fraud to a subsequent purchaser. *Hamilton* v. *Nutt*, 34 Conn. 501. No such knowledge, as respects the levy of execution, is charged against Tomlinson.

The question is not the same which would arise if the property had been under attachment upon *mesne* process in favor of Mrs. Schroeder, when he placed his deed on record.

The levy of an execution upon land, in respect to the rights acquired by the creditor, differs essentially from the levy of an attachment. The object of the latter process is to impose a lien; that of the former to transfer an estate. The first step in attaching land is to make an entry of the proceeding upon the land records; in setting land off on execution, the entry there is one of the last steps. When Tomlinson's deed was lodged with the town clerk, there was

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nothing on the land records to indicate that a levy had been begun. There was, therefore, neither knowledge nor notice; and it is unnecessary to inquire whether, had he had knowledge, the record of his deed would have been too late.

No title by adverse possession could be acquired by Mrs. Schroeder, subsequent to her levy, against the owner of the reversion, since her occupancy was justified under a paramount title, that is, the lease.

Her subletting, without his consent, was a cause of forfeiture, of which the defendant in error had a right to take advantage by the action of summary process. General Statutes, § 1358.

The rulings of the justice of the peace in the course of the trial have ceased to be material by reason of amendments of the pleadings before him made by mutual consent, and the stipulation filed in the Court of Common Pleas, upon which the case was reserved for our consideration. The verdict and judgment are supported by the agreed facts, and the cause was properly disposed of upon its merits.

The Court of Common Pleas is advised that there is no error.

In this opinion the other judges concurred.

ORIGEN BENNETT, EXECUTOR *vs.* EMMA A. PACKER ET AL.

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First Judicial District, Hartford, January Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

By one clause of his will a testator gave the residue of his property, real and personal, to his wife, and in a later clause provided that if she married after his decease she should take but one third of such residue. The will made no further disposition of the property. About nine years after the testator's death the widow remarried, and in a suit to determine the construction of the will, it was *held*:—

1. That the title acquired by the widow under the will, in two thirds of the residue, was a conditional limitation, which determined *ipso*

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facto upon her remarriage, when such portion of the residue became intestate estate; and that such limitation was not void as an unlawful restraint of marriage.

2. That the gift to the widow was in lieu of dower, but that she was entitled, under the statute of distribution, to one third of the intestate personal property.

[Argued January 4th—decided March 2d, 1898.]

SUIT to determine the validity and construction of the will of Lathrop H. Hooker of Mansfield, deceased, brought to the Superior Court in Windham County and reserved by that court, *Shumway, J.*, upon a finding of facts, for the consideration and advice of this court.

The will is as follows:—

"I, Lothrop H. Hooker, of Mansfield, County of Tolland and State of Connecticut, being of sound mind and memory do make and ordain this my last will and testament in manner and form as follows, viz:

"1st. Item. It is my will that all my just debts, funeral charges and expenses of erecting suitable monuments, be paid and discharged by my executor hereinafter mentioned.

"Item 2d. I give and bequeath to my daughters, Jennie L. Bacon, wife of Joseph H. Bacon, to Mary Eva Biles, wife of George S. Biles, to Emma A. Hooker and Adele M. Hooker, each One Hundred Dollars for their own separate use.

"Item 3rd. I give, bequeath and devise to my beloved wife, Susan M. Hooker, all the residue of my personal property and real estate owned by me at the time of my decease, for her own separate use and behoof.

"Item 4th. It is my will that if the said Susan M. Hooker again marries after my decease, I give, bequeath and devise to her, the said Susan M. Hooker, one third of my real estate and personal property for herself and her heirs.

"Item 5. I hereby appoint Origen Bennett the executor of this my will and testament.

"In witness whereof I have signed, sealed and published and declared this instrument as my will at Mansfield, Conn., on this twenty-eighth day of December, A. D., 1882.

"LOTHROP H. HOOKER. (Seal.)"

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The testator died April 24th, 1888. The value of the personal estate left by him is $3,797.53; the value of the real estate $6,075. His will was admitted to probate in May, 1888, and the plaintiff duly qualified as executor.

The daughters of the testator named in the second clause of the will were his children by a former wife. The said Susan M. Hooker was the second wife of the testator. They were married in May, 1862. After the death of the testator she, in January, 1897, married John W. Griggs, who died in November, 1897.

Our advice is asked upon the following questions: "Whether by the provisions of said will and of items 3 and 4 thereof, the testator's widow became entitled to an estate in fee simple in the real property of said estate. Whether by the provisions of said will and of items 3 and 4 thereof, said widow became entitled to a life estate in and life use of two thirds of the property of said estate, or whether said two thirds became at her said marriage intestate estate. Whether if said two thirds of said property is intestate estate at her said marriage, said widow became entitled to one third of the same. Whether the widow under item 3 of said will became entitled to the personal property of said estate absolutely. Whether, if two thirds of the property belonging to said estate became intestate upon the said marriage of the testator's widow, the real estate, other than that in which the widow has a dower interest, may be sold by the executor and the avails thereof be used to pay the expenses of settling the said estate."

Samuel B. Harvey, for the executor.

Elliot B. Sumner and *Huber Clark*, for Susan M. Griggs, the testator's widow.

Charles E. Searls and *William A. King*, for the testator's children.

HALL, J. The only claim made by Susan M. Griggs (formerly Susan M. Hooker) to the estate in question, in her

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written statement filed in the Superior Court in obedience to an order of that court is, that as widow and as devisee and legatee under the will she has an absolute title to all the real and personal property of the estate after the payment of claims and of the legacies given to the daughters.

The third clause of the will, considered independently of the other provisions, gives to the widow such absolute title to the residuum. But the several clauses of the will must be construed in relation to each other; and reading the third and fourth clauses together, it is clear that the fee to two thirds of the residue is a gift *durante viduitate*. Upon the fee to such two thirds the fourth clause imposes a conditional limitation, by which, upon the subsequent marriage of the widow, the estate determines *ipso facto*, without any re-entry or other act by the heirs of the testator. 2 Wash. R. P. (4th ed.) 24; *Phillips* v. *Medbury*, 7 Conn. 568, 573; *Sheldon* v. *Rose*, 41 id. 371. Such a limitation is not void as *in terrorem* and as placing a restraint upon marriage. Jar. Wills (6th Amer. ed.), *885, 886 and note; *Phillips* v. *Medbury*, *supra*.

The provisions for the widow by the third and fourth clauses of the will, were in lieu of dower. The intention of a testator that a provision of his will for the benefit of his widow shall be a substitute for her dower right, need not be expressly stated in the will. No technical words or terms are required to express such intention. Where such a provision is not expressly stated in the will to be in lieu of dower, the intention may be gathered from a consideration of the entire will; but it should be "demonstrated by clear and manifest implication." And unless such intention clearly appears from the will the widow is not put to her election. 2 Scrib. Dow. (2d ed.), 443; *Lord* v. *Lord*, 23 Conn. 327; *Alling* v. *Chatfield*, 42 id 276.

In *Lord* v. *Lord*, *supra*, the devise to the wife was not expressed to be in lieu of dower. The testator gave to his wife during her widowhood the use of his dwelling-house, garden and lot adjoining, one half the use of his fishery, the use of one half of his household furniture, the income from

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certain bank stock, and charged upon his farm the annual payment of certain products and gave her certain bank stock. The provision was held to be in lieu of dower. In *Evans's Appeal from Probate*, 51 Conn. 435, 440, a gift to the widow of the life use of the entire estate of the testator was held to be necessarily in lieu of dower. In *Anthony* v. *Anthony*, 55 Conn. 256, a gift to the wife of about two thirds of the income of the personal property and the use of nearly half the real estate was held to exclude dower, though not expressly stated in the will to be in lieu of dower.

In the case at bar the testator gave to his wife during widowhood the fee to about nine tenths of his entire property, and in the event of her remarriage an interest in his estate much greater in value than her dower right. We think it clearly appears from the entire will to have been the intention of the testator that the gift to the widow should be in lieu of dower, and that by her acceptance and enjoyment, for nearly ten years without claiming dower, of the benefit of a provision giving to her the fee of the residuum during widowhood, and thus placing it within her power to enjoy that estate during her life, and giving to her one third of the residuum absolutely in case of her remarriage, she is estopped from claiming dower in the estate which has become intestate by her marriage.

Is the widow entitled to share in the personal property of the intestate estate under the statute of distribution? Some expressions in the opinion in *Leake* v. *Watson*, 60 Conn. 498, 513, would seem to indicate that she was not. But the question was not really involved in the decision of that case, and the statement in the opinion that the widow was not entitled to share in the intestate estate "resulting from the failure of the remainders over to the heirs of the daughters," is based upon the peculiar circumstances of the case, among which were the facts that the testator did not contemplate that any part of his estate would become intestate, and that the widow did not claim the right to share in the intestate estate. In *Huntington's Appeal from Probate*, 30 Conn. 526, it was made a *quære* whether the will containing

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a provision for the benefit of the widow could be considered as affecting the rights of her heirs under the statute of distribution, to share in intestate estate. The case of *Sheldon* v. *Rose*, *supra*, was quite similar to the present case. There the testator bequeathed to his wife the use of all his estate so long as she remained his widow, and in case of her marriage the life use of one half of his property, the other half to brothers and sisters, but with no disposition of the remainder after the termination of the widow's life estate. The widow remarried. After her death it was held that one half the intestate estate should be distributed to the heirs of the widow. In *Evans's Appeal from Probate*, *supra*, the testator having no children gave to his widow the life use of his entire estate after the payment of debts, without an express statement that it was in lieu of dower. The widow declined in writing to accept the provision of the will, upon advice that her acceptance of it would not only bar her dower right, but also her right under the statute of distribution. This court held that she might revoke her election and claim under the will the use of the entire estate for life, and under the statute of distribution one half the personal estate absolutely; and that notwithstanding her acceptance of the provision of the will, which was held to be in lieu of dower, she was entitled as distributee under the statute to one half the personal property absolutely. In the recent case of *Nelson* v. *Pomeroy*, 64 Conn. 257, 262, it was held that the acceptance of the bequest to the widow which was expressed to be in lieu of dower, did not bar her from claiming her share of the intestate personal estate under the statute. In giving the opinion of the court JUDGE HAMERSLEY says: "*Pinkney* v. *Pinkney*, 1 Bradford (N. Y.) 276, seems to support the broad rule that a bequest to a widow 'in lieu of all right she may have in my real or personal estate, except as hereinafter mentioned,' does not exclude the widow from her distributive share of any property undisposed of by the will. Doubtless such a statement should be taken subject to the modification that a bequest to his wife in lieu of all claim on the testator's estate may be so framed that if she elect to

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take the bequest she will be estopped from claiming any share even of intestate property."

The widow's right to share in the personal property, unlike her right of dower, could have been defeated by the testator by a disposal of his entire estate by will. As it appears upon the face of the will that in the event of the marriage of the widow a part of the estate would become intestate, we think she may justly claim that she accepted the gift to her as a substitute for her right of dower only, and not in lieu of her statutory right to share in the intestate personal estate.

The Superior Court is advised:—

1. That by the provisions of the will the testator's widow did not become entitled to an absolute estate in fee in either the entire real or personal estate.

2. That upon the remarriage of the widow two thirds of the entire estate became intestate.

3. That the widow is not entitled to any part of the real estate of said intestate estate, but is entitled as a distributee under the statute to one third of the personal intestate estate.

Upon the question asked in the amendment to the complaint we give no advice, as it is not involved in the construction of the will.

In this opinion the other judges concurred.

James F. Chamberlin, Executor, Appeal from Probate.

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Third Judicial District, Hartford, January Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

At common law, as a general rule, the goods, chattels and credits of a deceased person were regarded as fully administered, so far as an administrator *de bonis non* was concerned, when they had been changed, altered, converted, or otherwise disposed of by the executor or administrator. This rule has been modified to some extent

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by statute in this State, and under our law administration is not necessarily regarded as complete until the assets of the estate have been turned over to those who are rightfully entitled to them.

Accordingly, if it appears that property which has been disposed of as testate estate is really intestate, it becomes the duty of the executor or administrator if living and capable, otherwise of an administrator *de bonis non* to be appointed for that purpose, to recover, hold and administer such estate in the orderly and prescribed way.

Although the Court of Probate has no power to determine directly and conclusively the construction to be given to a will, yet where an application for the appointment of an administrator *de bonis non* is based upon the claim that a clause of the will is void and the property therein attempted to be disposed of is intestate estate, such court may construe the will for the purpose of determining whether this claim is reasonable and made in good faith, or is without any foundation in law or fact, in order to determine whether such appointment should or should not be made.

[Argued January 4th—decided March 2d, 1898.]

APPEALS from orders and decrees of the Court of Probate for the district of Ellington, refusing to appoint an administrator *de bonis non* upon the estates of Elijah S. Chapman and of Eunice Chapman, deceased, taken to the Superior Court in Tolland County and tried as one case to the court, *Prentice, J.;* facts found and judgment rendered in each case in favor of the appellant, and appeal by the original appellees for alleged errors in the rulings of the court. *No error.*

The material facts are as follows: In March, 1879, Elijah S. Chapman died, leaving a will which was in the same month duly approved. The following is a copy of its material parts: "*Second:* I give, devise and bequeath unto my beloved wife, Eunice Chapman, the use and improvement, rents, profits and income of all my estate, real and personal, and wheresoever the same may be situated, to her during her natural life. *Third:* I give, devise and bequeath all my said estate, at the decease of my said wife, unto such person or persons, and in such shares or portions, as my said wife, Eunice Chapman, by her last will and testament, duly executed shall name, designate and appoint (provided she shall not give the same to Otis and Ambrose D. Snow, or either of them), to them and their heirs forever."

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Gelon W. West, Esqr., who was named as executor in the will, accepted said office and duly qualified as executor. In February, 1880, said executor filed an account purporting to be a final account of his administration of the estate, which account after due notice and hearing was approved and allowed.

In April, 1884, Eunice Chapman, widow of Elijah S. Chapman, died, leaving a will which was duly proved and approved, the material parts of which are the following: "*Third:* Whereas, my late husband, Elijah S. Chapman, did, by his last will and testament dated the 8th day of August, 1877, and admitted to probate in the probate court for the district of Ellington on the 22d day of March, A. D. 1879, give, devise and bequeath all 'his estate, at my decease, unto such person or persons, and in such shares or portions as I, by my last will and testament shall name, designate and appoint,' therefore I, the said Eunice Chapman, do give, devise and bequeath all said estate of my said husband, Elijah S. Chapman, and also all the rest and residue of my own estate not hereinbefore disposed of, unto Gelon W. West, of said town of Vernon, his heirs and assigns forever, and do hereby name, designate and appoint the said West as the person to receive all the estate of said Elijah S. Chapman, deceased, according to the provisions of said will of said Elijah S. Chapman, all of which said estate of said Elijah S., and said residue of my own estate, shall be to said West, his heirs and assigns, in trust for the uses and purposes following, to wit: To have the sole care and management of all said property, real and personal, and to pay over and deliver to my son, Doremus D. Chapman, during his natural life, all the rents, profits, interest and income of said trust estate, after deducting the expenses, incident to said trust, for the use and benefit of my said son; and if said rents, profits, interest and income shall, at any time, be insufficient to provide my said son with a good and comfortable support in sickness and in health, then and in that case I fully authorize and empower said trustee to use and expend so much of the principal of said trust estate as shall be necessary for

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that purpose, in his discretion. And I fully authorize and empower, and direct said trustee, when in his judgment it shall be for the interest of said estate, to sell and convey any portion or all of said trust estate, real and personal, and to invest and reinvest the same in such manner as he shall deem best for the interest of said estate, and in like manner to invest and reinvest all moneys belonging to said estate. *Fourth:* If, upon the decease of my said son, Doremus D. Chapman, any portion of said trust estate shall be remaining in the hands of said trustee, undisposed of, I authorize and direct said trustee to distribute, transfer and convey all said remaining estate, absolutely to such persons as would then be entitled to the same as heirs-at-law of the said Doremus D. Chapman, if said estate belonged to him, under the statute laws of the State of Connecticut then in force, if the same were intestate estate, that is to say: said trustee shall distribute said estate as aforesaid, to those persons who are the natural heirs-at-law of my said son at the time of his decease."

In the will of Eunice, Gelon W. West was named as executor as well as trustee, and he accepted said office and said trust and duly qualified both as executor and trustee.

In November, 1889, West filed an account of his administration of the estate of Eunice, as executor, and also as trustee under her will. These two accounts are the only ones ever filed by West in any capacity in connection with the estate of Eunice; and after due notice and hearing they were approved and allowed by the court. Both accounts showed a balance of $15,885.88 belonging to the trust fund, which consisted of both real and personal estate.

In November, 1889, George M. Paulk received from West said trust fund created by the will of Eunice, and has ever since continued to manage said fund and to act as the trustee thereof, under the provisions of said will, and now has said fund in his hands.

There is no record in the proper Court of Probate of the resignation of West as executor of Eunice, nor as trustee under her will, nor of the substitution of Paulk for West in

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any capacity connected with said will, estate, or fund, except what is contained in said records in a certain bond executed by Paulk on the 23d of November, 1889, reciting that he had been appointed executor and trustee on the 18th of November, 1889, in place of West resigned. In fact Paulk was never appointed other than as trustee of said fund, and has never claimed or assumed to act otherwise than as trustee. West died in January, 1890.

Elijah and Eunice Chapman left surviving them three children, to wit: Adeline L., now the wife of Ambrose Snow, Mary E., now the wife of Otis Snow, and Doremus D. Chapman, who was unmarried at the death of his mother. After his mother died Doremus married, and in December, 1896 died, leaving a widow, Ella H. Chapman, but no issue. He left a will which has been duly approved, by which he gave all of his property and estate of every kind to his wife, and appointed James F. Chamberlin as his executor, who has duly qualified and is now acting as such executor. No administrator *de bonis non* has ever been appointed, either upon the estate of Elijah or Eunice Chapman, and no executor or administrator upon either of their estates has ever been appointed except as before stated.

There is now in the hands of Paulk, acting as trustee as aforesaid, after deducting all rents, profits, interest and income during the life of Doremus, and all expenses incident to said trust, certain real and personal property originally belonging to Elijah S. Chapman, which came into the hands of the trustee of Eunice under her will, and certain real and personal property originally belonging to Eunice which came into the hands of West, her executor and trustee.

In March, 1897, the executor of Doremus, claiming that said property in the hands of Paulk was intestate property belonging to the estates of Elijah and Eunice, respectively, which had never been administered, applied to the Court of Probate for the appointment of an administrator *de bonis non* upon each estate, and that court denied the applications. The executor of Doremus took an appeal to the Superior Court, where he made the following claims:—

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"1. That the attempted exercise of a power of appointment by said Eunice Chapman in said clause of her will above set forth, was in violation of the statute of perpetuities which was in force at the time of the death of said Eunice Chapman, in so far as the gift over of the remainder upon the death of Doremus D. Chapman is concerned, and that said appointment is therefore to that extent invalid, and the attempted disposition of such remainder was of no effect in law. 2. That the estate remaining in the hands of said acting trustee, so derived from the estate of said Elijah S. Chapman, was, by reason of the premises, intestate estate, and must be distributed in accordance with the provisions of the statute law of this State. 3. That in order that the property and estate in the hands of said acting trustee may be distributed among the persons entitled thereto, it was necessary that an administrator *de bonis non* with the will annexed be appointed on said estate."

The claims of the present appellants upon the trial in the Superior Court, were as follows:—

"1. That the issue involved in the appeal from the decree of the Court of Probate refusing to appoint an administrator *de bonis non* with the will annexed on the estate of said Elijah S. Chapman, was whether there was an administrator competent to act, and whether there was any property which had not been administered, belonging to said estate. 2. That inasmuch as the only property in question was property which formerly belonged to the estate of Elijah S. Chapman, and that said estate, as well as the estate of Eunice Chapman, had been settled and final account rendered by the executors thereof, and the property in question delivered to the trustee under the will of Eunice Chapman, the administration upon the estate was complete, and there was no property belonging to it which an administrator *de bonis non* with the will annexed would have any jurisdiction over, if appointed. 3. That an administrator *de bonis non* could not properly be appointed, inasmuch as there was no property belonging to said estate which had not been administered upon by the former executor thereof. 4. That the appoint-

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ment of George M. Paulk, as trustee under the will of Eunice Chapman, successor to Gelon W. West, deceased, and also as executor, was in effect an appointment of Paulk as administrator with the will annexed, and there was therefore no vacancy in the office. 5. That neither the will of Elijah S. Chapman nor of Eunice Chapman, nor the construction of any clause in either of those wills, was properly before the court, and that the status of the property, as it might be ascertained by the construction of the wills referred to, could not affect the question at issue, because whoever might be entitled to the property now in the hand of the trustee, after the death of the life tenant, it was nevertheless property which had been fully administered, and the same could not be recovered by an administrator *de bonis non* with the will annexed on the estates of Elijah S. Chapman and Eunice Chapman, if one should be appointed. 6. That the property in question in the hands of the trustee under the will of Eunice Chapman, was within the jurisdiction of the Court of Probate, and within the jurisdiction of a court of equity; and it was competent for any persons who claimed an interest in said property to bring a petition to the Court of Probate, or an action against the trustee, and thus determine their rights to the property, without the intervention of an administrator *de bonis non*. 7. That although neither the will of Elijah S. Chapman nor of Eunice Chapman was properly before the court in this appeal, if the construction of those wills, or either of them, was to be considered by the court, then the appellees are entitled to the property in question, under the will of Eunice Chapman, as the only heirs of Doremus D. Chapman, and that the same was not in violation of the statute of perpetuities."

That court in effect sustained the former and overruled the latter claims, and rendered judgment in favor of the executor.

Lewis Sperry and *Charles Phelps*, for the appellants (the original appellees).

It is clear, not only that no further administration is needed, but that the appointment of an administrator *de*

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bonis non would avail nothing, because, upon the facts as they appear of record, the administrator could have no jurisdiction in the premises. *Alsop* v. *Mather*, 8 Conn. 584; *American Board, etc., Appeal*, 27 id. 344; Schoul. Exrs. & Adm. (2d ed.) § 408; 1 Woerner Amer. Law of Adm. p. 395; 2 id., p. 743; *Beall* v. *New Mexico*, 16 Wall. 540; *United States* v. *Walker*, 109 U. S. 258; *Wilson* v. *Arrick*, 112 id. 83; *Fisk* v. *Norvel*, 9 Tex. 13; *Boyle* v. *Forbes*, ibid. 41; *Murphy* v. *Menard*, 14 id. 62–67; *Finn* v. *Hempstead*, 24 Ark. 117; *Wilcoxon* v. *Reese*, 63 Md. 542; *Catlin* v. *Huestis*, 11 Ohio C. C. 120. The case at bar is much stronger in its detailed facts than any of the cases above cited. The executor in the present case has inventoried the property in question, has settled the estate, has paid the debts and legacies, has delivered the property to the testamentary trustee under order of court, has filed his final account, which has been accepted and allowed; and the title to the property which passed under the will to the executor, has passed from the executor to the testamentary trustee under the provisions of the will and under the order of the Court of Probate. And as an administrator *de bonis non* takes title, not from his predecessor, but from the deceased, it is plain that if an administrator *de bonis non* were appointed in this case, he would take title to nothing and could enforce no claims against anybody. Parties in interest might recover the property from the trustee, in any proper form of action, by establishing their right to the property, but an administrator *de bonis non* could recover nothing if he were appointed, because there is no unadministered estate to which his jurisdiction could attach. This is not an action for the construction of a will. There is nothing uncertain or indefinite regarding the terms of either will. The heirs are now, and have always been, the children of Elijah and Eunice Chapman, and the sisters of Doremus D. Chapman. The property has never been in danger of being carried beyond the line drawn by the statute of perpetuities. No danger other than that of a mere naked possibility ever threatened the property given by the will.

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William Waldo Hyde and *Joel H. Reed*, for the appellee (the original appellant).

The property in question is intestate estate. The trust attempted to be created by the will of Eunice Chapman was of no effect, so far as the attempted disposition of the property remaining after the death of Doremus D. Chapman is concerned. The so-called trustee, Paulk, is in exactly the same position as any other person would be who was found to hold, without right, property belonging to a deceased person. 1 Jar. Wills, 559; 18 Amer. & Eng. Ency. of Law, 357, and cases cited; Gen. Stats. § 2952. Under this statute it has been held over and over again that any conveyance by devise, bequest or grant, which may by any possibility violate the statute, is void, whether it does so in fact or not. *Jocelyn* v. *Nott*, 44 Conn. 55; *Leake* v. *Watson*, 60 id. 498; *Beers* v. *Narramore*, 61 id. 13; *Belfield* v. *Booth*, 63 id. 299; *Morris* v. *Bolles*, 65 id. 45; *Ketchum* v. *Corse*, ibid. 85; *Johnson* v. *Webber*, ibid. 501. The claims of the other side are based upon three assumptions: 1. That the estates had been finally settled by West, executor. 2. That Paulk had been appointed administrator, as well as trustee. 3. That Paulk was still a trustee as to the remainder of said property in his hands, and therefore could be reached by proceedings in equity. The first assumption is devoid of substance, either in law or fact. As to the second assumption, it is based on the phraseology of the bond, and nothing else. The only other evidence stated in the finding was Paulk's conduct, and the court has found that he never claimed or assumed to act as executor or administrator. From these two things alone the court would be justified in finding that Paulk was never appointed administrator. But the fact is as stated, that there is nothing to show that Paulk was ever legally appointed trustee. The third assumption is based, apparently, on the theory that Paulk is a trustee legally qualified to hold the unexpended balance of said funds. There is no trust; hence there is no trustee. Paulk has no more to do with that fund than any man who happens to hold property of another in his hands at the time of the decease of the

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owner. The title to personal property, on the death of the owner, vests in his executor or administrator, and the heirs entitled to distribution have no right of possession until after distribution made. *Roorbach* v. *Lord*, 4 Conn. 347; *Roath* v. *Smith*, 5 id. 133; *Griswold* v. *Bigelow*, 6 id. 258; 1 Sw. Dig. 445; 7 Wms. Pers. Prop. 7. It does not, as yet, appear who are the distributees. The only court which can determine that question is the Court of Probate. *Connecticut, etc., Co.* v. *Security Co.*, 67 Conn. 438; *Smith* v. *Doe*, 33 Md. 442; *Neal* v. *Charlton*, 52 id. 495; Crosw. Exrs. § 214. The case of *Woodhouse* v. *Phelps*, 51 Conn. 521, has no application here. The court will construe the will so far as to determine whether or not an administrator shall be appointed. *Purdy* v. *Hayt*, 92 N. Y. 446; *In re Moore*, 152 id. 602; *Chesebro* v. *Palmer*, 68 Conn. 207.

TORRANCE, J. In 1879 Mr. Chapman died, leaving a will in which he gave the life use of all his property to his wife, and at her death he gave it to such person or persons as she by her will should appoint. In 1880 the executor under this will rendered his final administration account, which was accepted and allowed. In 1884 Eunice, the wife of Mr. Chapman, died, leaving a will in which she appointed Gelon W. West as the person to receive all the estate of her husband in her possession at her decease, and also gave to him the entire residue of her own estate, in trust to pay the rents and profits of the entire property to her son Doremus during his life, and at his decease to distribute the trust property to those persons who should then be his natural heirs at law. In November, 1889, West, the trustee and executor under the will of Eunice, filed his accounts as trustee and as executor, which were duly allowed and accepted. He then had in his possession something over fifteen thousand dollars belonging to the trust fund, consisting of both real and personal estate. He resigned his office of trustee, and Mr. Paulk was appointed his successor in that office. West died in 1890. Paulk has acted as trustee, under the will of Eunice, since his appointment.

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In December, 1896, Doremus died, leaving a will in which he left all his property to his widow. The executor under that will claimed that the trust property in Paulk's hands at the death of Doremus, was intestate property belonging to the estates of Elijah and Eunice, in which he had an interest, and that an administrator *de bonis non* upon each estate should be appointed, in order that said claim might be tried and determined. The Superior Court took the executor's view of this matter, and the principal question here is whether it erred in so doing.

The claim that the property in Paulk's hands is intestate property, is based upon the assumption that the gift over to the heirs of Doremus, in his mother's will, is void. The appellants claim, in substance: 1. That even on the assumption that the property in Paulk's hands is intestate estate, it would not be assets in the hands of an administrator *de bonis non*, because it has been already fully administered, and consequently such an administrator ought not to be appointed, for he would have nothing whatever to do. 2. That the question whether the property is or is not intestate estate, was not properly before the lower court and could not be determined by it. 3. That if such question was before it for determination, it should have held the gift over to be valid and not void.

The first claim is not tenable. It is based mainly upon rules of the common law which were never adopted in this State, or have been changed or modified by statute, or have little or no application in these cases. At common law "executors and administrators took the legal title to the goods and chattels of the deceased; nor were they, before the statute of distribution, 22d and 23d, Car. II., (1670), bound to distribute the surplus after the payment of debts. Both held in *autre droit*, and therefore neither could dispose by will of the property remaining in *specie;* both had the power, while living, of changing, altering and converting the property, and whatever was thus altered or converted, became their own goods and descended, on their deaths, to their own representative. Such change or conversion of the goods,

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was (so far as regards the administrator *de bonis non*), a complete administration, and put them as effectually beyond the reach of his commission, as if they had never belonged to the testator or intestate." *Coleman* v. *McMurdo*, 5 Rand. (Va.) 51, 55; *Potts* v. *Smith*, 3 Rawle (Pa.), 361; *Beall* v. *New Mexico*, 16 Wall. 535; and cases cited in note in 24 Amer. Dec. 379.

A somewhat technical meaning was thus given to the word "administered," so far as regarded the administrator *de bonis non*. As to him, goods, chattels, or credits of the decedent, changed, altered or converted by the executor or administrator, were "administered." The administrator *de bonis non* succeeded only to goods, chattels and credits of the decedent which had not been administered; and goods, chattels and credits "not administered," meant goods, chattels and credits which had been the property of the decedent at his death, and remained in specie, unchanged and unconverted when the administrator *de bonis non* was appointed. Thus money received by the former executor or administrator in his representative capacity, and kept by itself separate from his own money, is regarded as "not administered;" but if mixed and mingled with his own money so that its identity is gone, it is regarded as converted and so "administered," so far as the administrator *de bonis non* is concerned. *Beall* v. *New Mexico*, *supra*, 535; *Marvel* v. *Babbitt*, 143 Mass. 226. The administrator *de bonis non* was regarded as taking the specific property of the decedent, as his immediate successor, and not as succeeding to a prior executor or administrator; hence there was said to be no privity between them. Suits brought by or against the predecessor could not as a rule be prosecuted by or against his successor, and judgments obtained by or against the predecessor were not available in favor of nor against the successor. *Alsop* v. *Mather*, 8 Conn. 584; *Amer. Board, etc., Appeal*, 27 id. 344.

These rules of the common law have been changed or modified to some extent in many, if not most, of the States, including our own. The rule that an executor or an admin-

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istrator was entitled to the surplus of the personal estate after the payment of debts, was never adopted in this State. *Bacon* v. *Fairman*, 6 Conn. 121–129. They are regarded here as mere agents or trustees for those beneficially entitled to the property, as creditors, legatees, heirs or distributees. *Woodhouse* v. *Phelps*, 51 Conn. 521–523; *Robbins* v. *Coffing*, 52 id. 118, 143; *Wilmerding* v. *Russ*, 33 id. 67. And it is now made a crime for any executor or administrator to "wrongfully appropriate and convert to his own use the money, funds, or property" of the estate. General Statutes, § 1579. At the very beginning of this century it was by statute made the duty of an administrator *de bonis non*, "to ask for, demand and receive," of his predecessor, "his heirs . . . or administrators, all the goods and effects of the deceased, and also all the books of account, bonds, notes or other securities, documents or papers whatsoever, touching the estate, which may be needed in the settlement thereof"; and it was further provided that all actions at law or in equity, pending against such predecessor when he went out of office, should survive and might be prosecuted by or against his successor. Revision of 1808, p. 272. These provisions, in substance, have been law ever since, and other changes in the same direction have been made from time to time, as shown by the General Statutes. An executor of an executor is no longer, as at common law, entitled to administer the estate of the first testator; § 553. When a will disposes of only a part of the estate, the executor or administrator with the will annexed is *ex officio* the administrator of the intestate estate; § 564. When an executor or administrator dies before completing or accounting for his trust, his personal representative must settle the account in the Court of Probate, and pay the amount found due to the successor; § 617. Courts of probate, after the removal of an executor or administrator and the appointment of his successor, may enforce the delivery of property held by the former, to the latter, "in the same manner as a court of equity might do"; § 612. Under § 445, an executor or administrator paying money or delivering property pursuant to the order of a Court of Pro-

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bate having jurisdiction, is protected from personal liability, even if the order is subsequently set aside; but the property so delivered or money paid, may be recovered "by the person entitled thereto, from any person receiving or in possession of the same." These, and other statutory changes which it is unnecessary to refer to, have modified the doctrines of the common law with reference to the rights and duties of an administrator *de bonis non*.

Under the changes thus made in our law this court, in *Pinney* v. *Barnes*, 17 Conn. 420, 427, held that money of the estate in the hands of an executor removed from office, "no matter from what source received, nor for whom ultimately destined," belongs to the administrator *de bonis non*, and that he was the proper party to institute proceedings to recover the same against his predecessor in office. In *Mansfield* v. *Lynch*, 59 Conn. 320, it was held that where an executor had paid over money of the estate by mistake to a creditor, the administrator *de bonis non* could sue for and recover from the creditor the money so paid. In that case the money so paid by the executor wrongfully or mistakenly, was an asset of the estate which had been administered by him, within the technical common law meaning of that word, but this fact was not allowed to defeat the right of the administrator to sue for and recover it.

If, then, the property here in question is intestate estate, and has already been administered within the common law meaning of that term, so that under the rules of that law an administrator *de bonis non* could not claim it nor administer it, still, we think that under our law such an administrator would be entitled to claim and recover and administer it. It does not appear to be wanted to pay debts, but if it be intestate property it is wanted for distribution, and administration is never complete until the assets of the estate have been turned over to those rightfully entitled to them.

But even if the strict rules of the common law are to govern in this matter, we think, on the facts found, that the administrator *de bonis non* would be entitled to recover, hold and administer this property, if intestate. It is found that

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the property in Paulk's hands is substantially the same identical property which belonged to Elijah and to Eunice Chapman. It still exists in specie, unchanged and unconverted, so far as appears, in the hands of a third person, who, if it be intestate property, has no legal right to it. Under these circumstances it would, even under the rules of the common law, go to the administrator *de bonis non*. *Beall* v. *New Mexico*, *supra*.

In either view of this matter, then, if the property is in fact intestate, we think the administrator *de bonis non* of the estates of Elijah and Eunice Chapman, is entitled to recover, hold and administer it as assets of those estates. Indeed he is the only person who can properly do so. *Pinney* v. *Barnes*, 17 Conn. 420.

The appellants say that the distributees of Elijah and Eunice can sue for and recover it and divide it amongst themselves, all the debts having been paid. But who are the distributees? That question must be settled by the Court of Probate, and in order that it may do so, "it is plainly essential that such an estate (an intestate estate) should be pending for settlement in said court, in the orderly and prescribed way." *Conn. Trust, etc., Co.* v. *Security Co.*, 67 Conn. 438, 442. And to secure this essential in the cases at bar, the executor of both estates being dead and no successor ever having been appointed, it is necessary that an administrator *de bonis non* upon each estate should be appointed.

The claim of the appellants, that Paulk was appointed as the successor of West in the administration, and was now administrator, is not borne out by the finding, and need not be further considered.

The other two grounds of error claimed may be considered together. They are, briefly, first, that the court below erred in construing the wills at all; and second, that it erred in holding that the gift over in Eunice's will was void.

The power to determine directly and conclusively the construction to be given to wills, is not committed to the Court of Probate, nor to the Superior Court sitting as an appellate court of probate. Such a power involves the right to try

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and finally determine disputed titles to property real and personal, and this is not given to those courts. *Hewitt's Appeal*, 53 Conn. 24; *Mallory's Appeal*, 62 id. 218; *Cone et al. Appeal*, 68 id. 84. But though the Court of Probate cannot directly try and finally determine questions of title to personal property, it has the power to pass upon them incidentally and indirectly and for some specific purpose, whenever such an incidental power is necessary to the exercise of a jurisdiction confessedly conferred upon it. Thus it has been held that, although it is not competent for the Court of Probate to determine directly the amount or validity of creditors' claims, it had power, in the settlement of the administration account, to decide on the validity of the claims of creditors paid by the administrator or executor, so far as respects the allowance of such payments in his account; *Edmond* v. *Canfield*, 8 Conn. 87; and that it had the incidental power to determine who the heirs are, "for the particular purpose of completing the settlement of the estate, and in order that the executor may be protected;" *Davenport* v. *Richards*, 16 Conn. 310, 319. The Court of Probate has the exclusive power to appoint executors and administrators, under conditions prescribed by law; and in determining, in a given case, whether it will exercise that power, it must possess the incidental power to decide, subject to review on appeal, whether the conditions for the exercise of its power to appoint, exist; and this may include, in cases like the present, the power to construe wills for the purpose of deciding whether the claim made under them is made in good faith, and whether it is or is not *prima facie* utterly without any foundation in law or in fact.

In the cases at bar the executor of Doremus claimed before the Court of Probate, that the property in question here was intestate estate, because the gift over in the will of Eunice Chapman was void; that if that were so, part of said property belonged to him as the representative of Doremus; that the executor upon both estates was dead and no one had been appointed in his stead; and that he desired to have an administrator *de bonis non* appointed upon each estate, to the end

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that he might properly prosecute his claim. These claims he also made in the Superior Court. It was the province and duty of both courts to look at the wills and to construe them to the extent, and for the purpose, of determining whether the claims were made in good faith, and whether they were or were not utterly without foundation in law or in fact. Further than this they were not bound to go. It was not within the province of either court nor was it its duty, to pass finally upon the validity of the executor's claim that the gift over was void, nor did the Superior Court, we think, attempt to do this. In *Woodhouse* v. *Phelps*, 51 Conn. 521, an administrator *de bonis non* was appointed, though it turned out that there was nothing for him to do; in *State* v. *Smith*, 52 Conn. 557, such an administrator was appointed, although it turned out that there was no property belonging to the estate; in *Conn. Trust, etc., Co.* v. *Security Co.*, 67 Conn. 438, such an administrator was appointed, although it was claimed that the property sought to be recovered through him had never vested in his decedent. In these and cases like them, it is not the duty of the Court of Probate, when asked to appoint an administrator *de bonis non*, to pass upon the legal validity of the claims sought to be made available through such an appointment; *Mallory's Appeal*, 62 Conn. 218; it is enough that the claim is made in good faith and appears to have some foundation in fact or in law.

If the claim of the executor was made in good faith, and did not *prima facie* appear to be utterly without reason or foundation in fact or in law, and if the appointments might avail the executor, then we think that upon the other facts found it was the duty of the Court of Probate to make them.

In this view of the law there is no error apparent on the record.

In this opinion the other judges concurred.

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ALEXANDER WILDMAN *vs.* EDMUND D. MUNGER ET UX.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

An appeal to this court may be taken from the wrongful refusal of the trial court to award costs to the defendant upon the plaintiff's withdrawal of the action. The decision or determination of the trial court under such circumstances constitutes a final judgment, within the meaning of the statute relating to appeals to this court

Section 990 of the General Statutes allowing a defendant who has entered his appearance, to take judgment for costs upon the withdrawal of the action after it has been returned to court and entered upon the docket, applies to cases withdrawn before, as well as to those withdrawn after, the return day.

[Argued January 18th—decided March 2d, 1898.]

APPEAL from the alleged erroneous refusal of the Court of Common Pleas in Fairfield County, *Curtis, J.*, to render a judgment for costs in favor of the defendants. *Error and cause remanded.*

The following are the material facts in the case: On September 3d, 1897, the plaintiff procured the issuance of a writ and complaint against the defendants, setting forth an equitable cause of action and praying only for an injunction, returnable on the first Tuesday of October, 1897, to said Court of Common Pleas. On the day the writ was issued a temporary injunction was granted, *ex parte*, and duly served on the defendants. On the 11th of September, 1897, upon motion of the defendants, and after a hearing in vacation, the temporary injunction was dissolved.

The writ was returned to court prior to September 20th, 1897, and on that day the plaintiff filed a written notice of withdrawal, and the case was withdrawn. The case was not entered on the docket until October 6th, 1897, when, at the request of the defendants, the clerk entered it on the docket, with the following entry: "Oct. 6th, '97. Defendants enter case for costs." The defendants on the same day filed a written claim for costs with the clerk. The

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defendants thereafter made a motion to the court for a judgment for costs, "and the court in the exercise of its discretion, if lawful, would have allowed costs to the defendants to the extent of their disbursements, and $10 in addition; but the court held that under the circumstances detailed above it had no jurisdiction, and no authority to exercise its discretion in favor of the defendants." The defendants claimed that the court had jurisdiction and power to exercise its discretion in granting costs in the case, but the court overruled the claim and denied the motion for costs.

The reasons for the court's action are stated as follows: "Section 990 of the General Statutes provides under what circumstances costs may be awarded upon the withdrawal of a civil action. The statute can have but one construction, to wit, that it is only after a case has been duly returned to court and entered on the docket, and an appearance entered for the defense, that such costs can be allowed. This must mean that no costs can be allowed upon a withdrawal before the return day, before which day a case cannot be considered as properly docketed and an appearance properly entered."

Howard W. Taylor, for the appellants (defendants).

Henry A. Purdy, for the appellee (plaintiff).

TORRANCE, J. Upon the argument before this court the plaintiff claimed that no appeal would lie in this case, because there had been, as he claimed, no final judgment, and indeed no judgment at all, rendered in the case. But if the case was properly before the court at all, if the defendants were entitled to costs under the circumstances, the decision or determination of which they complain put an end to the suit and to their claim for costs, and if they are entitled to any redress at all, they can have it only by way of appeal, as here, or by writ of error; and they can have redress in neither mode, unless the action of the court below can be regarded as a final judgment within the meaning of the stat-

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ute allowing an appeal of this kind, or a writ of error. In *Main* v. *First School District*, 18 Conn. 214, it was held that an order of the Superior Court remanding a cause to the County Court, could be reviewed upon writ of error, because the appellant would be otherwise remediless; and in *Woodruff* v. *Bacon*, 34 Conn. 181, an order erasing a cause from the docket was held to be a final judgment which could be reviewed upon a motion in error. In *Fayerweather* v. *Monson*, 61 Conn. 431, it was held that a judgment dismissing an application for a writ of prohibition was a final judgment from which an appeal lay.

The reasoning of the court in these cases is applicable in the present case, and if the law is so that the defendants were entitled to costs, then we are of opinion that the appeal was well taken.

Whether the defendants were entitled to costs depends upon the construction of § 990 of the General Statutes, which reads as follows: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise; but such judgment shall not be rendered after the expiration of six months from the date of such withdrawal; and no costs shall be allowed, which accrued after actual notice, in writing, of the withdrawal, was given by the plaintiff to the defendant or his attorney; unless good reason therefor shall be shown to the court."

The court below held that this section, allowing a judgment for costs, applied only to cases where the withdrawal takes place after the return day, and not to cases where it takes place before that day.

The language of the statute, read as it stands, certainly favors such a construction; but we think it is not the correct construction. The matter of withdrawing actions in vacation seems to have been regulated by statute for the first time in 1848. By Chap. VII. of the Public Acts of that year it was provided in three sections, in substance, as follows: (1) that

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the plaintiff in any civil action returnable to the Superior Court or County Court, and returned to said court or to the office of the clerk, might withdraw it on giving the notice prescribed; (2) that the clerk should enter the action so withdrawn on the docket of the court at the next term, "in the same manner as though it had not been withdrawn," with a note of its withdrawal, etc.; (3) that if the defendant within the first three days of said term entered for costs, then the plaintiff should be liable to pay costs accrued at the time of the entry, "in the same manner as though the action had been withdrawn in open court." Under a statute like this the defendants, in the case at bar, would certainly be entitled to costs. This statute, in the form in which it was passed, was embodied in the Revision of 1849 as §§ 53, 54 and 55, p. 63. It appeared in identically or substantially the same form in the Compilation of 1854, p. 66, and in the Revision of 1866, §§ 67, 69 and 70, p. 15. Between 1866 and 1875, the provisions of this statute were made applicable to the Court of Common Pleas and District Courts, but no change was otherwise made in it till the Revision of 1875.

In that Revision the three sections were consolidated into one, § 14, p. 418, and certain additions were made which provided in substance as follows: (1) that the plaintiff in any civil action returnable to the Superior, Common Pleas, or District Courts, and returned to its clerk or to his office, might withdraw it in vacation, by filing in such office the prescribed notice; (2) that the clerk should enter the action upon the docket of the court at its next term, with a note of the withdrawal and of its date; (3) "if such term be that to which such action was originally brought, and the defendant shall, within the first three days of said term, enter his claim for costs, or if it be not the first term, and he had already appeared to defend, a judgment of nonsuit shall be thereupon entered against the plaintiff; but no costs, except for travel and attendance, shall be allowed which accrued after his giving the defendant or his attorney notice of the withdrawal, in writing; unless good reason therefor shall be shown to the court."

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This section clearly contemplates a withdrawal both *before* and *after* the return day and the appearance of the defendant in the cause, and that costs, under certain conditions, should be due to him in either case. It also provides for a judgment of nonsuit against the plaintiff in either case. Section 11, p. 446, of that Revision further provided as follows: "Upon the withdrawal of any civil action, after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, unless waived by him, shall be rendered in his favor." By Chap. 98 of the Public Acts of 1881, the words "except for travel and attendance," in § 14 of the Revision of 1875 aforesaid, were stricken out by way of amendment.

In 1882 (Public Acts of 1882, Chap. 90) the following law was passed: "Section 1. Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise; but such judgment shall not be rendered later than the term of court following the term or the vacation when such action was withdrawn. Section 2. Section eleven, chapter fourteen, title nineteen of the General Statutes (page 446), and so much of section fourteen, chapter five, title nineteen of the same (page 418) as is inconsistent herewith, are hereby repealed."

Thus the law stood upon this matter until the Revision of 1888. In that Revision the law as it was in § 14, p. 418, of the Revision of 1875, and in Chap. 90 of the Public Acts of 1882, except so far as it may have been changed in the work of revision, is embodied in §§ 989 and 990.

Now we think it is quite clear that just prior to the revision the law was so that a defendant in a case like the one at bar would have been entitled to costs, either under § 14 or Chap. 90 aforesaid, separately, or under the two combined; and the question is whether the legislature changed or intended to change the law, so as to deprive defendants of

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costs in cases like the one at bar. In 1889 (Public Acts 1889, Chap. 11) § 989 was amended by inserting after the word "vacation," in the third line, the words "or at any time before the day on which the action is made returnable." Reading §§ 989 and 990 in the light of previous legislation upon this matter, we can discover no indications that the legislature, in adopting the revision, intended to make any such change in the law. On the contrary the indications are the other way. In a case like the one at bar it is clearly made the duty of the clerk, under § 989, to enter the action upon the docket of the court, with a note of the withdrawal and of its date. To what end is this to be done if the court has nothing further to do with the case and the entry can avail the defendant nothing?

We think § 990 is to be construed as if it read thus: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, a judgment for costs shall be rendered in favor of the defendant, after an appearance has been entered for him and he claims costs, but not otherwise." So far as we are aware the practice has ever been in accordance with this view of the law. We are therefore of opinion that § 990 applies to cases withdrawn before, as well as after, the return day, and that in the former, as well as in the latter, class of cases, the defendant is entitled to costs, provided that in the former class he enters in time and claims costs.

There is error in the decision complained of and it is set aside, and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

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JOSEPH CANTONI ET AL. *vs.* JAMES A. BETTS.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A court whose jurisdiction is limited to cases in which the matter in demand does not exceed $500, cannot adjudicate the validity and priority of a mortgage given to secure a note for $1,900, although the determination of that issue is auxiliary to the foreclosure of a judgment lien for an amount less than $500. The causes of action are separate and distinct.

[Argued January 19th—decided March 2d, 1898.]

WRIT of error to reverse a judgment of the City Court of Danbury, brought to the Superior Court in Fairfield County and tried to the court, *Shumway, J.;* facts found and judgment rendered for the plaintiffs, reversing the judgment of the City Court, in part, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

James A. Betts, the defendant in error, had a judgment lien on land in Danbury belonging to Joseph Cantoni, one of the plaintiffs in error, for $180.70. The land became subject to this lien January 16th, 1896. January 6th, 1896, and before the judgment lien accrued, Joseph Cantoni mortgaged the land to one Antonia Badaracco to secure a promissory note for $1,920, and on the same day Badaracco assigned the note and mortgage to Louise Cantoni (wife of Joseph), the other plaintiff in error.

On June 22, 1896, Betts brought an action to the City Court of Danbury against Joseph Cantoni, Antonia Badaracco and Louise Cantoni, setting forth his ownership of the judgment lien and the existence of the prior incumbrance in the hands of Louise Cantoni, (but without specifying the amount of the mortgage note); alleging that the mortgage note was given without consideration, and for the purpose of defrauding the plaintiff and other creditors of Joseph Cantoni, and claiming: (1) a judgment that said mortgage

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be postponed to, and be decreed to be junior and inferior to, the judgment lien; (2) a foreclosure of said judgment lien; (3) possession of the premises. The defendants pleaded to the jurisdiction, alleging that the mortgage sought to be set aside was given to secure the payment of $1,920, and was executed and recorded before the judgment lien accrued. To this plea the plaintiff demurred, because jurisdiction of the court was determined by the amount of the judgment lien, and the amount of the mortgage was immaterial. The City Court sustained this demurrer. The defendants, after a vain attempt to have the complaint amended so as to state the amount of the mortgage, answered, alleging that the mortgage was given to secure a *bona fide* debt for $1,920, evidenced by a promissory note for that amount; that the whole amount of said note is still due and unpaid, and denying the charges of fraud. The reply of the plaintiff admitted the amount for which the mortgage was given, but denied its good faith.

The judgment file recites the complaint, the appearance of the parties, the plea to the jurisdiction and demurrer, the sustaining of the demurrer, the defendant's attempt to secure an amendment of the complaint, the filing of an answer and the reply, and the default of the defendants on June 12th, 1897; and then finds the allegations of the complaint true and renders judgment as prayed for.

The plaintiffs in error brought a writ of error from this judgment of the City Court to the Superior Court. The defendant in error pleaded "nothing erroneous," and the Superior Court found error, except as to that part of the judgment of the City Court which adjudged a foreclosure of the judgment lien, and adjudged that the remainder of the City Court judgment be reversed and set aside. From this judgment of the Superior Court the defendant in error appealed, claiming the judgment to be erroneous on the face of the record.

John F. Cuff and *Aaron T. Bates*, for the appellant (defendant).

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Howard W. Taylor, for the appellees (plaintiffs).

HAMERSLEY, J. The party seeking foreclosure may cite in an incumbrancer prior in date for the purpose of contesting his priority and of asking a cancellation of the deed, or that it may be declared fraudulent and postponed as to him. The right, however, to have a prior mortgage set aside on the ground of fraud, constitutes a distinct cause of action, which a plaintiff may or may not join with his foreclosure suit. *De Wolf* v. *Sprague Mfg. Co.*, 49 Conn. 282, 307.

The judgment of the City Court was therefore divisible into: (1) a judgment of foreclosure against Joseph Cantoni, the owner of the equity; and (2) a judgment against Louise Cantoni, adjudging her prior mortgage to be fraudulent and void and postponed as to Betts, the owner of the judgment lien. The mortgage held by Louise Cantoni was given to secure a note for $1,920, and the matter in demand, in an action to set this mortgage aside, is a lien upon the land to the amount of $1,920. The fact that the validity of the mortgage is contested does not affect the amount as a test of jurisdiction. *Schunk* v. *Moline, M. & S. Co.*, 147 U. S. 500, 505. The jurisdiction of the City Court is limited to cases "where the matter in demand does not exceed five hundred dollars." Private Acts of 1889, § 83, p. 1019. Its judgment therefore against Louise Cantoni was void. The infirmity appears on the record. The plea to the jurisdiction alleged the amount of the prior mortgage sought to be set aside, and this was admitted by the demurrer. The answer alleged the amount of the mortgage, and this allegation was admitted in the reply. The judgment file refers to the plea to the jurisdiction and demurrer, and also to the answer and reply; so that the judgment itself, by reference to other parts of the record, shows that it was rendered in a matter outside the jurisdiction of the court.

It is claimed that when Mrs. Cantoni withdrew from the case and suffered a default, she also withdrew her pleadings; but were this so, she could not withdraw from the court its judicial knowledge. The error of the City Court lay in not

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dismissing the action as against Louise Cantoni, the moment it was advised of the amount of the mortgage. *Denison* v. *Denison*, 16 Conn. 34, 38; *Fowler* v. *Bishop*, 32 id. 199, 206; *Denton* v. *Danbury*, 48 id. 368, 372.

Section 809 of the General Statutes provides that "in actions for the redemption or foreclosure of title of property claimed to be subject to a mortgage or lien, the amount of the debt or liability secured by such mortgage or lien, as described in the mortgage or certificate of lien, shall be deemed to be the amount of the matter in demand." This Act does not, as claimed by the defendant in error, affect the question before us. The action against Louise Cantoni does not come within its provisions. The claim made, that because the action is in aid of a foreclosure of which the court has jurisdiction, therefore the amount of the matter in demand is immaterial, cannot be maintained. The equitable powers of the City Court are limited by the statute fixing its jurisdiction, and it cannot extend them as if it were a court of general jurisdiction. As a court of equity the City Court may take cognizance of subordinate controversies when appropriate to the full disposition of the main controversy before it; but as a court of limited jurisdiction it can take cognizance of no controversy, whether subordinate or not, where the matter in demand exceeds $500. In other words, the limitation of its jurisdiction controls its exercise of equity power. Any other construction would practically annul the statute and vest in the City Court of Danbury an unlimited equity jurisdiction.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL. *vs.* THE CITY OF NEW HAVEN.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Section 3481 of the General Statutes, passed in 1883, forbids the construction of highway crossings at grade over the tracks of a railroad. *Held* that this prohibition applied to all highway grade crossings not fully completed at the passage of the Act, without regard to whether such highways were laid out before or after that time.

A city has no right to enter upon the layout of a railroad and construct or repair a highway grade crossing by laying planks and timbers between the rails. This work is required by statute (§ 3499) to be done by the railroad company, and in case of its wrongful neglect or refusal performance may be enforced by the railroad commissioners.

Section 31 of the defendant's charter gave to its common council sole and exclusive authority and control over all streets and highways within the city limits, and sole and exclusive power to lay out, make and repair such highways. *Held* that this provision must be construed with reference to the general statutes giving to the railroad commissioners the control of highway grade crossings, and, in case of conflict, must yield to the paramount authority of the general law.

[Submitted on briefs January 20th—decided March 2d, 1898.]

SUIT to restrain the defendant from constructing any highway crossing upon the roadbed of the plaintiffs at certain streets in the defendant city, brought to the Superior Court in New Haven County and tried to the court, *Roraback, J.*, upon the plaintiff's demurrer to the defendant's second defense; the court sustained the demurrer (following a ruling of *Thayer, J.*, in sustaining a similar demurrer at an earlier stage of the cause) and rendered judgment for plaintiffs, and the defendant appealed for alleged errors in the rulings of the court. *No error.*

The complaint contained three counts, and alleged that within the limits of the city two certain ways, known respectively as Ivy street and Hazel street, run up to and abut

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upon the layout of the railroad where its tracks are constructed, which is owned in fee by the New Haven & Northampton Railroad Company, of which company the New York, New Haven & Hartford Railroad Company are lessees; that said ways have never been constructed across the rails and layout of the plaintiffs; that the portions of said ways within the limits of the layout of the railroad have long since been abandoned and discontinued, and have been impassable in vehicles, by reason of ditches and embankments within the former lines of said ways and by reason of the absence of planking or other means for making said crossings passable; that in September, 1896, the boards of aldermen and councilmen of New Haven passed an order "that the board of public works should, by grading and planking, construct crossings within the lines of the layout of said Ivy street and Hazel street, so as to make a way over the tracks of said railroad at grade passable for vehicles and travelers"; that said city, through its board of public works, threatens to open said streets and construct the same over and across the property of the plaintiffs, and thereby establish two dangerous grade crossings, contrary to the policy and the statutes of the state; and that the defendant through its officers and agents threatens unlawfully to enter upon, plank, timber and otherwise construct a crossing and passage-way across the layout and rails of the plaintiffs at said places.

In one of its answers the defendant alleged that said Hazel and Ivy streets were, and for more than thirty years had been, highways, and as such had existed across the railroad tracks of the plaintiffs, and during all that period had been open to public travel and been used by the public for the purposes of travel.

The plaintiffs demurred to this answer, upon the ground that it did not appear that said city had the right to construct or order the construction of a passage-way across said layout. This demurrer was sustained by the court.

The defendant also filed a second defense to all the counts of the complaint, which was as follows: —

"1. Said Hazel and Ivy streets are and have been high-

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ways for more than thirty years, and as such have existed across the railroad tracks of the plaintiffs, and during all of said period they have been open to public travel, and as such have been used for the purposes of public travel. 2. The defendant admits the passage of the order referred to in paragraphs 4 and 5 of the plaintiffs' first and second counts. 3. It is the duty of the plaintiffs to plank said crossings, and said city intends to take all legal steps to compel the planking of said crossings, and it is admitted that said city did intend to place planks between the rails on said crossings within the limits of the said highways, taking all necessary precautions for the safety of the public and those traveling on the trains of the plaintiffs, in case the plaintiffs failed to fulfill their duty."

The plaintiffs demurred to this answer, upon the ground that "even if Hazel and Ivy streets, respectively, are highways, and it is the duty of said plaintiffs to plank said crossings, it does not appear that the city has the right to construct or order the construction of a passage-way across said layout, or to place planks between the rails on said crossings within the limits of said highways, even though in so doing it take all necessary precautions for the safety of the public and those traveling on the trains of the plaintiff, The New York, New Haven and Hartford Railroad Company, until it shall first have exhausted all legal means for compelling said plaintiff, The New York, New Haven & Hartford Railroad Company, to construct said passage-ways as aforesaid."

The court sustained this demurrer, and rendered judgment permanently restraining the defendant from entering upon the roadbed of the plaintiffs for the purpose of laying any plank or placing any substance between the rails or upon the ties of the railroad tracks or roadbed of the plaintiffs. The sustaining of these demurrers and the rendering of said judgment in favor of the plaintiffs, are the reasons of appeal assigned by the defendant.

William H. Ely, for the appellant (defendant).

Section 3499 of the General Statutes requires the defend-

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ant to plank its crossings, but the company refuses to do this, and, while refusing and while violating the law, asks a court of equity to uphold it in its refusal and to prevent the city from doing anything to improve these crossings. Clearly under these circumstances an injunction should not be issued at the demand of the railroad company. *Pittsburg, etc., Ry. Co.* v. *Chicago*, 42 N. E. Rep. 783. The right of a railroad company to run its trains across a street is strictly subordinate to the public right of ordinary travel. *Railroad Co.* v. *Carson*, 66 Tex. 345.

George D. Watrous and *Edward G. Buckland*, for the appellees (plaintiffs).

The plaintiff has the sole right to construct highway crossings over its tracks, either of its own free will, or under the direction and orders of the railroad commissioners. Gen. Stats. §§ 3499, 2673. The city of New Haven has no right to construct a crossing and lay planking upon the layout and tracks of the appellees. The specific means of compelling the construction of crossings, resides wholly in the railroad commissioners. The statute which creates this obligation excludes all other means. Endlich Interp. Stats. §§ 154, 465; *Camden* v. *Allen*, 26 N. J. L. 398; *U. S.* v. *Lyman*, 1 Mason, 481; *Sharp* v. *Curtiss*, 15 Conn. 526; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Moyer* v. *Kirby*, 14 Serg. & R. 162; *State ex rel. N. H. & D. R. Co.* v. *R. R. Com'rs*, 56 Conn. 308. The provisions of a subsequent specific statute or charter are to be complied with, to the exclusion of the provisions of a prior general statute. *Townsend* v. *Little*, 109 U. S. 504; *Dewey* v. *Central Car & Mfg. Co.*, 42 Mich. 399; *State* v. *Clark*, 25 N. J. L. 54; *State* v. *Morristown*, 33 id. 57. The city was, at least, premature in attempting to plank a crossing over the tracks of the appellees; it should have first made a request of the railroad company to construct said crossings, and if said request had been refused, should have applied to the railroad commissioners as required by § 3499 of the General Statutes.

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HALL, J. The complaint alleges that neither Ivy nor Hazel street has ever been constructed across the layout and rails of the plaintiffs, and that that portion of each of said streets within the limits of the layout of the railroad is, and for a long time has been, impassable in vehicles, by reason of ditches and embankments and the absence of planking. The defendant answers that said streets for more than thirty years have been highways, and as such have existed across the railroad tracks of the plaintiffs, open to public travel and used for the purposes of public travel. The plaintiffs demur to this answer.

There seems to be some doubt from the pleadings whether grade crossings have ever been constructed over the plaintiffs' tracks at the places in question, nor is it entirely clear from the record what the contention of the defendant is as to the power of the city of New Haven in the construction of these crossings.

The order of the court of common council of New Haven, which the answer admits to have been passed, directs the board of public works "by grading and planking" to "construct crossings within the lines of the layout of said Ivy street and Hazel street, so as to make a way over the tracks of said railroad at grade passable for vehicles and travelers."

If it be the defendant's claim that because Ivy and Hazel streets were laid out as highways thirty years ago across the plaintiffs' tracks, and that though the crossings have at no time been actually completed across the rails of the plaintiffs' railroad, and have never been constructed so as to be passable by vehicles, yet because these streets have been open across the tracks and have been used to some extent for the purposes of public travel during that period, the city may now construct grade crossings at these points, or may by grading and planking complete the partially constructed crossings so as to render them passable in vehicles,—such claim is, in our opinion, untenable.

Section 3481 of our General Statutes prohibits the construction of a highway, or a new portion of a highway, across a railroad at grade. This section does not mean that high-

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ways which have been laid out as such across the tracks of a railroad at grade, before the passage of the Act, can after the enactment of the law be constructed across the rails at grade. It is not the laying out, but the construction of the highways across a railroad, which is required by statute to be over or under the railroad. *Smith* v. *New Haven*, 59 Conn. 203, 210.

Even though these highways were laid out across the plaintiffs' tracks many years before the passage of the Act of 1883, and though the construction of the highways across the tracks had been partially finished, and so as to admit of their use in some of the ordinary methods of public travel, but not in others —as for foot travelers, but not for vehicles— neither the court of common council nor the railroad commissioners had authority after this law had gone into operation, to order the completion of the construction of the crossings at grade. If such partial construction of the highway is to be completed, it must be over or under the railroad, as may be directed by the railroad commissioners.

This court in the case of the *New York & N. E. R. Co.* v. *Waterbury*, 55 Conn. 19–24, in speaking of the purpose of this Act said: "It means that although a highway may have been previously laid out, partially constructed and even built upon, if it has not actually been completed for public use across the rails of the railway, such crossing shall not thereafter be made." And again: "If it (referring to the highway then under discussion) had been legally laid out, the construction of any portion of it across the plaintiff's railway at grade became illegal before it was accomplished."

But the record before us does not furnish a complete history of the construction of these crossings, nor full information as to their present condition. We must, therefore, consider the case in another of its possible aspects. Let us assume that the construction of these crossings had been fully completed for public travel in all its ordinary forms, before the passage of the Act of 1883; but that at the present time, in order to render public travel across the railroad at these points safe and convenient, it is necessary that the

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rails should be protected or guarded by planks or timbers placed between and immediately outside of the tracks. May the agents of the city, under an order of the court of common council, enter upon the layout of the railroad and construct or repair the crossing by laying such planks and timbers?

We think it clear that they cannot; and that the city can neither do this work by its own agents, nor authoritatively order it to be done by the railroad company, even after the refusal of the latter to perform it. This work, though for the benefit of those who use the highways, should be performed so that neither the act nor the method of construction will unnecessarily interfere with the operation of the plaintiffs' railroad, and so as in the least degree possible to endanger life and property. Manifestly, it can best be so performed by and under the direction of the experienced employees and officers of the railroad company. Section 3499 of the General Statutes expressly requires this work to be done by the company operating the railroad crossed by such highway. The city of New Haven would not be liable for an injury to person or property caused by the unprotected and unguarded condition of these railroad tracks. Section 2673 of the General Statutes providing an action for injuries sustained by reason of defective roads and bridges, enacts that "when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." The tracks of a railroad are a structure, within the meaning of this provision. *Lee* v. *Barkhampsted*, 46 Conn. 213–218.

It is claimed by the defendant that § 31 of its charter, giving the court of common council sole and exclusive authority and control over all streets and highways within the limits of said city, and sole and exclusive power to lay out, make or order and repair such highways (9 Special Laws, p. 287), empowers the city to construct these crossings. The plaintiffs contend that under § 3499 of the General Statutes this work must be done by the railroad company and not by the city, and that upon the refusal or failure of the railroad company its performance can be compelled only by the order of the railroad commissioners.

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By the law of this State the railroad commissioners and not the municipal authorities, have sole original jurisdiction of questions relating to changes in highways at grade crossings, when the determination of such questions affects the safety of the public. *State's Atty.* v. *Selectmen of Branford*, 59 Conn. 402–411. In view of the public statutes giving the railroad commissioners the control over highways at grade crossings, which were in force at the time of the passage of the Act of 1881 amending the defendant's charter, and of the public laws upon that subject which have been since enacted, the language of § 31 of the city charter should not be interpreted literally. It must be construed with reference to these general laws; and the general laws concerning the control of highways at grade crossings, in so far as they conflict with the provisions of § 31, must control.

The subject of the relative powers, over highways at railroad crossings, of the court of common council of New Haven, as defined by § 31 of its charter, and those of the railroad commissioners, under the general laws of the State, has been recently considered by this court in the cases of *Cullen* v. *New York, N. H. & H. R. Co. et al.*, and *Tallmadge* v. *Same*, 66 Conn. 211–222.

It is our conclusion that the city authorities of New Haven have neither the power to order the railroad company to construct or repair these crossings by planking or timbering them, nor to perform this work of construction or repairing by the agents of the city; that if this work may now be lawfully done and this crossing be made passable at grade, the only remedy of the city, upon the refusal or neglect of the railroad company to perform the duty imposed upon it by statute, is by application to the railroad commissioners under the provisions of § 3499 of the General Statutes.

There is no error.

In this opinion the other judges concurred.

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THE STATE *vs.* THOMAS J. KALLAHER.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In a prosecution for theft, evidence that the accused threatened to burn *M*'s dwelling-house with its inmates, unless *M* would comply with his demand for money, is relevant and admissible as tending to prove that *M* parted with his money because of a reasonable fear of immediate bodily injury to himself and family.

Whether the person who thus parts with his property was in actual fear, and if so, whether that fear was reasonable, are questions of fact to be determined in each particular case by the language of the threat, the conduct of the accused, and the circumstances surrounding the property owner.

In the present case the accused, during the same conversation and as part of it, threatened that he would bring a civil suit against *M* and attach all his property. *Held* that evidence of this threat was admissible in connection with and as introductory to the more serious threat, although not a ground for a charge of larceny.

The trial court charged the jury that if the accused, knowing he had no claim to the money, obtained possession of it openly, but by deception, artifice or fraud, and subsequently converted it to his own use, they would be justified in finding that the taking was with felonious intent and that larceny had been committed. *Held* that while this statement, detached from the context, was open to criticism, the instructions as a whole were correct, intelligible and sufficient for the guidance of the jury.

In the charge the trial court said to the jury that theft was included in the crime of robbery, but that in its opinion the proof in the present case would not warrant a conviction for the latter offense. *Held* that while this remark was irrelevant, it afforded the accused no just ground of complaint.

[Submitted on briefs January 20th—decided March 2d, 1898.]

INFORMATION for theft, brought to the Superior Court in New Haven County and tried to the jury before *George W. Wheeler, J.;* verdict and judgment of guilty, and appeal by the accused for alleged errors in the rulings and charge of the court. *No error.*

The information contained three counts: the first charging the theft on February 23d, 1897, of two hundred dollars

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from Ellen F. Munson; the second, the theft on the 8th day of March, 1897, of eight hundred dollars from Ellen F. Munson; and the third, the theft on the 8th day of March, 1897, of eight hundred dollars from George O. Munson. At the conclusion of the testimony the attorney for the State disclaimed a conviction on the first and second counts, and claimed a conviction upon the third count only. The jury found the accused guilty on the third count, and not guilty on the first and second counts.

Upon the trial of said cause the State offered evidence to prove and claimed to have proved, that in June, 1896, said Munson employed the accused as a farm hand; that he continued substantially all of the time in the employ of said Munson as such farm hand, from that time until the 21st of February, 1897, when he was discharged on account of his intemperate habits; that in August and September, 1896, there was some talk between the accused and Munson and his wife about going into the chicken business together, but the parties never arrived at any agreement; that the accused at the time he was discharged in February, 1897, claimed that Munson was indebted to him for his work; that Munson did not in fact owe the accused anything at that time, and so stated to the accused; that the accused thereupon threatened said Munson and his wife that if they did not settle with him and pay him what he demanded, he would cause everything they had to be attached and taken from them, but offered to settle with them and give a receipt in full for $200; that the accused continued to threaten more or less, if they did not settle with him and pay the $200, and on February 23, 1897, Mrs. Munson gave him $200 in full settlement of all claims whatsoever, but the accused never gave a receipt in full and would not do so; that thereupon the accused left, but again returned on the 3d day of March and for the first time spoke to Mrs. Munson about having a further claim upon her and her husband by reason of their failure to go into the chicken business with him, and that they must pay him to settle such claim the sum of $800, and that if they did not do so he would cause all of their property

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to be attached and taken from them, and their house to be burned and destroyed, so there would be nothing left but chimneys to tell the tale; that he came again to the Munson house about 9 o'clock in the evening of March 11th, in a somewhat intoxicated condition, when Mr. and Mrs. Munson and their two children were ill and unable to leave the house; that the accused renewed his claim for the $800, informing Mrs. Munson that he knew they had the money in the house, and threatening at first that if they did not pay the money to him immediately he would cause everything they had to be attached, saying that he had been to New Haven that afternoon and seen his lawyer; that the papers had been drawn and were in the hands of sheriff Spiegel, who would be out there the first thing in the morning to attach everything they had, but if they paid him the money that night he could stop it; that afterwards, however, he threatened that if they did not pay over the money to him immediately he would burn and destroy their house, and that there would be no one left to tell the tale; that Mrs. Munson inquired of him, "What do you mean, that you will burn us up with it?" and that he replied that he did; that he repeated these threats until after eleven o'clock, when Mrs. Munson, who was crying during the t me of the threats and because of them, finally called her husband down from upstairs and told him in the presence of the accused what he had been saying to her; that thereupon the accused repeated the threats in the presence of Mr. Munson, also remarking, referring to his courage and ability, that "if he was in a crowd he didn't care for anything but a knife, he would cut his way through;" that during the time of the threats, as aforesaid, Mrs. Munson had endeavored to persuade him to wait until morning, but he refused to consent to any delay and insisted that he must have the money then, that night; that finally Mr. Munson, through fear of his (the accused's) burning and destroying life, as he had threatened, took $800 from his safe and handed it to his wife, in the presence of the accused, that she might count it; that thereupon the accused took it from Mrs. Munson's hands and remained in the house

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about fifteen minutes, when he left, it then being about 12 o'clock, midnight; that thereupon the accused left the house with the money and went to New Haven.

The defendant offered evidence to prove and claimed to have proved, that while working for said Munson he was dissatisfied with his position, and told Munson that he should leave; that thereupon Munson, about September 1st, represented to him that if he would stay he, Munson, would go into the poultry business with him that winter, and give him an interest therein; that thereafter the defendant remained with Munson until about February 18th, 1897, and during said time rendered services, negotiated for the purchase of materials, and assisted in the construction of a building for Munson, in preparation for the carrying on of said business as agreed upon; that about the 18th day of February, 1897, Munson refused to carry out the agreement to go into business with the defendant; that the defendant thereupon threatened to bring suit against said Munson and to attach his property for failure to carry out said agreement, and that said George and Ellen F. Munson then promised the defendant that said George Munson would pay him $1,000 damages for the breach of his contract to go into said business, as aforesaid; that on the 23d day of February, 1897, the said George and Ellen F. Munson paid the defendant $200 in partial settlement of the claim which he had against them aforesaid, and that on said day the defendant gave to the said Ellen F. Munson a simple receipt for said $200, but refused to give a receipt in full, though requested to do so; that on the first day of March, 1897, the defendant came to the house of the Munsons to collect the additional $800 agreed on, intending to go to Hartford that night; that the said George and Ellen F. Munson promised him then that he should be paid the $800 the following Thursday if he would stay over with them, and he assented; that thereafter the defendant was taken sick and the said Ellen F. Munson became sick, and it was agreed that the payment of said sum of money should be postponed until Tuesday, the 11th of March; that thereafter, on the evening of the said 11th day of March, the

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defendant demanded said sum of $800, and stated that if the sum was not paid immediately suit would be brought by him and the property and house of the said Munson would be attached, and that the papers in the lawsuit had been placed in the sheriff's hands, which last statement the accused admitted was untrue; that influenced by fear of the defendant, caused by said statements, and in order to prevent their property and the house from being attached, the said George Munson handed the sum of $800 to the said Ellen F. Munson, who, in his presence, immediately delivered it to the defendant.

During the trial of the case Ellen F. Munson, a witness in behalf of the State, was asked the following question with reference to the occurrences of the evening of March 11th: "Now state what happened there about that time." The witness answered: "He demanded the $800, and I told him I had not got it. He said: 'It is in the house; if you don't give it over, the sheriff will be here and attach.' He said if we didn't there would be nothing but chimneys left to tell the tale. I asked him if he meant the building would be burned, and he said, 'Yes.'" Said witness was thereupon asked this question: "You may state if before this evening, as to which you have testified, the accused said anything to you in regard to what he would do, if you didn't give over the $800, about the buildings." The witness answered: "He did, the 3d day of March." She was then asked to state what he said, and answered: "He asked me if I was going to give him the $800. I told him I hadn't got it. He spoke then: 'Then there will be nothing but chimneys left, and no one to tell the tale,' and I asked him if he meant he would burn us up, and he said, 'Yes.'"

To this evidence counsel for the accused objected, "unless the threat to burn was expected to be carried out immediately, if the money was not paid;" and that threats were only admissible if made at the immediate time that the money was paid. To the ruling of the court admitting this evidence counsel for the accused excepted.

The same witness and also George O. Munson, as witnesses

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in behalf of the State, testified that at the time the $200 was paid, and at the time of the payment of the $800, the accused threatened to bring a civil suit and attach the property of the said Munsons, and threatened that if they did not pay said sums the sheriff would be there and attach all their property. To this evidence counsel for the accused objected, upon the ground that a threat to enforce a claim by civil suit is never ground to support a conviction for theft or for robbery. To the ruling of the court admitting this evidence counsel for the accused excepted. These rulings are among the alleged errors assigned in the appeal to this court.

The appellant further alleges that the court erred in stating the following in its charge to the jury: "If the possession of property of another to which the taker has no claim, be obtained openly, but by deception, artifice or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent and the crime of larceny committed." And in stating in its charge to the jury the following: "It has been said to you that if this case presented before the jury is anything, it is a case of robbery. But the crime of larceny, gentlemen, is necessarily included in the crime of robbery; so that if it were true that this case presented upon the evidence were a case of robbery, the jury would be justified upon such proof in finding the accused guilty of larceny. But the evidence seems to me clear enough to warrant me in saying to you that I do not think the proof would admit of a conviction of robbery in this case."

In its charge to the jury the court made the following statements in addition to those previously quoted: "While the felonious intent may be found from a secret taking, it may be found from an open taking, provided, for instance, that it may be by deception, artifice, or fraud. If the title to the property as well as the possession of the property be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the

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possession. The crime may be obtaining goods under false pretenses, but it is not larceny. . . . Threats which will be regarded as effective, in the eye of the law, to cause a degree of fear depriving the owner of property of his consent to its taking, will be threats of personal violence, either danger to life, or great bodily harm. . . . The compulsion of the payment of a valid claim, or one believed to be valid, by threat to bring civil suit and attach, thus causing fear and inducing, as a result of the fear, the payment of the money, is not larceny. The compulsion of the payment of money not owed, and which the taker knows is not owed, by threats to bring civil suit and attach, causing fear under the influence of which the money is paid, is not larceny. The threat made which induced the fear which caused the money to be paid, must be a threat which it was apprehended would speedily be put in execution, and under the influence of a fear of its speedy execution the money was paid over. The money must have been paid under the influence of fear of great bodily harm to be speedily caused by the taker.

"To summarize, gentlemen, some of these claims, and perhaps the vital ones: If the jury find that Kallaher secured this money having an honest claim to it, or honestly believing he had such a claim, he should be acquitted. If the jury find that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted. If the jury find that the threat was to do great bodily harm to the Munsons, and that this caused fear on their part, if the fear was not that the threat would be speedily or immediately executed, Kallaher should be acquitted. If, on the other hand, the jury find that the evidence establishes beyond a reasonable doubt that Kallaher secured this money as claimed, without a right to it, and without believing that he had a right to it, and by a threat to endanger the lives of the Munsons or to do them great bodily harm, which threat the Munsons believed would be speedily executed, and induced fear on their part, under the influence of

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that fear that the threat would be speedily executed during that night, they paid over the money as charged, then the accused would be guilty of the crime as charged. . . . It is for the jury to determine as a question of fact what the threat was. Was the fear of the Munsons, if there was fear on their part, that there would be a speedy or immediate execution of this threat by Kallaher? That, the jury must determine as a question of fact from the evidence."

Roger S. Baldwin, *Edward J. Maher* and *Martin Conlon*, for the appellant (the accused).

The court erred in admitting the testimony of the witness Ellen Munson, tending to prove that the defendant, at the time the sum of $800 was paid him, threatened that he would burn the house of the Munsons. 2 East's P. C., 712, 715, 721, 731. The threat of an attachment was inadmissible in evidence. It was introduced, as the record shows, to prove a taking of property against the consent of the owner, and a specific objection was made to its introduction for that purpose; and though the court afterwards told the jury to disregard it, yet, as the whole case was tried upon this theory, the testimony had so entered into and biased the jurors' minds, that they could not at that late moment efface it from their recollections. *Bussey* v. *The State*, 71 Ga. 100; *Harmon* v. *Harmon*, 61 Me. 227; *Wolfe* v. *Marshall*, 25 Mo. 167; Poll. & W., Possession, 219, 220. In *State* v. *Daubert*, 42 Mo. 246, irrelevant testimony was admitted, and the court in its charge ordered the jury to disregard it. On appeal, it was held too late, the higher court saying: "They had heard it detailed; it had poisoned their minds and its effects could not be erased from their memories." See also *State* v. *Mix*, 94 Pa. St. 114. The court erred in charging the jury as to the effect of obtaining possession of property by stratagem or artifice and subsequently converting it to the taker's use. *Haley* v. *The State*, 49 Ark. 154: *Loomis* v. *People*, 67 N. Y. 327. The charge in relation to the question of robbery, was also prejudicial to the defendant. Where threats are relied upon to prove a taking of property against the consent of

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the owner, the threats must be of the same degree of constructive violence to sustain a conviction for larceny, as would be required for robbery. *Rex* v. *Wood*, 2 Leach C. C. 833–839. See also *State* v. *Graff*, 66 Ia. 483.

William H. Williams, State's Attorney, and *Alfred N. Wheeler*, for the appellee (the State).

The trial court was correct in its rulings upon testimony. There can be no question as to the admissibility of the threats during this evening between nine o'clock and eleven, under the circumstances; and as to the threats made on the 3d of March, it was simply a question of their weight with the jury; of course, the more remote the less weight would be likely to be attached to them; but the remoteness would not render them inadmissible. The threats to bring the suit and attach the property were but introductory to the threats to burn the house and destroy the lives of the family. The accused was abundantly protected against any conviction on account of the threats of attachment alone. The charge of the court in relation to obtaining possession of property by deception, artifice or fraud, etc., was correct. *State* v. *Fenn*, 41 Conn. 590; 1 Whart. Cr. Law, §§ 891, 915, 971. The charge of the court in which it is stated that the crime of larceny is necessarily included in the crime of robbery, and that if it were true that in this case the evidence proved a case of robbery, yet that the jury would be justified, upon such proof, in finding the accused guilty of larceny, is a correct statement of the law. *Hickey* v. *State*, 23 Ind. 21; *State* v. *Jenkins*, 36 Mo. 372; *People* v. *Jones*, 53 Cal. 58; 1 Whart. Cr. Law, § 858, and cases cited. If property is delivered up by one person to another through fear of personal injury, or any threat calculated to produce terror, the crime of robbery has been committed. Rosc. Cr. Ev. p. 954; *Rex* v. *Harmon*, 2 East's P. C. 736; 1 Whart. Cr. Law, § 851; *Rex* v. *Toplin*, 2 East's P. C. 712; *Rex* v. *McGrath*, L. R. 1 C. C. 205; *Rex* v. *Lovell*, L. R. 8 Q. B. 185; *Rex* v. *Hazell*, 1 Cox C. C. 597; *State* v. *Howerton*, 58 Mo. 581. If one deliver up property to another under fear of a threat

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to burn his house, it is robbery. *Rex* v. *Astley*, 2 East's P. C. 729; *Rex v. Simons*, ibid, 731; *Rex* v. *Brown*, ibid, 721.

HALL, J. The only objection to the admissibility of the evidence offered by the State in proof of the threats of the accused to burn the house of the Munsons, which seems to be urged by counsel for the accused in their brief submitted to us, is that it should not have been received "unless the threat to burn was expected to be carried out immediately." The record shows that evidence was offered by the State to prove that these threats, made by the accused when he was somewhat intoxicated, to Mr. and Mrs. Munson in their own house between 9 and 12 o'clock at night, when both they and their children were ill, Mrs. Munson being too ill to leave the house, were that if they did not pay over the money to him immediately he would burn and destroy their house, and that there would be no one left to tell the tale, and that he meant to burn them up in it; that he refused to consent to any delay, but insisted that he must have the money then, that night; and that finally Mr. Munson, through fear that the accused would burn and destroy life as he had threatened, paid him the $800.

To constitute the crime of larceny the taking must not only be felonious, but without the consent of the owner. But a felonious taking with the consent of the owner, when the giving of such consent is not a voluntary act, but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury, is, in the eye of the law, a taking without the owner's consent. 1 Wharton's Crim. Law, §§ 850, 851, 852 and note 5; 2 Bishop on Crim. Law, § 1169; 2 Greenleaf on Evidence (13th ed.), 193. Whether such apprehension of danger existed, and, if so, whether it was a reasonable apprehension, are questions of fact, and must be determined in each particular case by the language of the menaces of the accused, his actions, and the circumstances surrounding the person who thus parts with his property. *Morris* v. *Platt*, 32 Conn. 75-83. Clearly, the evidence offered by the State of the threats made by the

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accused in the present case tended to prove that Munson parted with his $800 because of a reasonable fear of immediate injury to himself and to his family. It was for that reason admissible. The jury were instructed by the court that if the fear was not that the threats to do great bodily injury to the Munsons would be speedily or immediately executed, the accused should be acquitted.

The threat of the accused that he would bring a civil suit and attach all the property of the Munsons, was a part of the statement in which he threatened to burn the building and its inmates. It was admissible as a part of that conversation, and is introductory to the proof of a more serious threat. It nowhere appears upon the record that the court held that the obtaining money by threats to commence a civil action and to attach property, could constitute larceny. On the contrary, the court distinctly charged the jury that if they found that "Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he (Kallaher), believed in his claim or not, he should be acquitted."

It is claimed by counsel for the accused that the following statement made by the court in its charge to the jury, was irrelevant and harmful to the defendant: "If the possession of property of another to which the taker has no claim, be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent and the crime of larceny committed."

The court in this part of its charge was instructing the jury how a criminal intent might be proved, and not as to what constituted a taking without the owner's consent. The State was required not only to prove that the accused obtained this money by threats of personal violence, but with a felonious intent which existed at the time of the unlawful

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taking. The language quoted must be read in connection with that which precedes and follows it, and when so read it will be seen that the court was pointing out to the jury that when the taking was without the consent of the owner, the jury would be justified in finding that it was with felonious intent, even though it was not secret, but open, if the accused without having any claim to the property had thus openly obtained possession of it by deception, artifice or fraud.

In this case there was no claim that the owner had by deception or fraud been induced to part with the mere possession of the money, independently of the ownership, as was claimed regarding the note in the case of *State* v. *Fenn*, 41 Conn. 590. When Munson parted with the $800 he did so not because he supposed he was asked to part with the possession of the bills only. He understood fully that the accused demanded not the mere possession of the money, but the money itself.

The portion of the charge complained of, when considered by itself, is open to the criticism that the jury might have understood from this language that if they found that the accused had no just claim to this money, nor an honest belief in the claim which he made to it, and that Munson parted not with the possession only but with the ownership of the $800, because of the false and fraudulent representations of the accused that he had commenced a civil action against Munson and that the papers were in the hands of the sheriff to attach all his property, they might upon those facts not only find a taking with felonious intent, but a taking without the consent of the owner, and convict the accused of the crime of larceny.

But when we regard the entire charge of the court, we think the jury could have placed no such construction upon this language. In the two sentences immediately preceding the one under discussion, the court said to the jury: "If the title to the property as well as the possession of the property be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under

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false pretences, but it is not larceny." Again, in its final summary to the jury of the questions of law involved in the case, the court, as has been before observed, said: "If the jury find that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted." The court concludes its discussion of the questions of law, by stating upon what facts the jury might convict the accused of larceny, namely, upon proof that Kallaher secured the money "without a right to it and without believing he had a right to it, and by a threat to endanger the lives of the Munsons or to do them great bodily harm, which threats the Munsons believed would be speedily executed, and induced fear on their part, and under the influence of that fear that the threat would be speedily executed during that night, they paid over the money as charged."

It seems to us clear that no jury of ordinary intelligence could have understood from the charge of the court that they might convict the accused of larceny upon finding that he obtained the money in question by false and fraudulent representations, and without finding it proved that he made the alleged threat of great bodily injury to the Munsons; and that therefore the accused was not prejudiced by the language of the court in this part of the charge.

The last claim made in the brief of counsel for the accused is, that the court erred in stating to the jury that the crime of larceny was included in the crime of robbery, but that in the opinion of the court the proof in this case would not admit of a conviction of the crime of robbery.

The ground of the defendant's complaint seems to be the remark of the court that the evidence would not warrant a conviction of robbery. The court correctly stated to the jury the elements of the crime of larceny, which was the only charge in the information, and what facts were required to be proved to support a conviction of that offense. The duty of the jury to convict or acquit depended upon the proof or the failure to prove these facts, and not upon the question

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of whether such facts, if proved, were sufficient to sustain the charge of robbery. That inquiry was irrelevant.

We have only noticed those reasons of appeal which are discussed by counsel for the accused in their brief.

There is no error.

In this opinion the other judges concurred, BALDWIN and HAMERSLEY, Js., with hesitation.

JOSEPH H. BUCKLEY *vs.* DANIEL F. KELLY.

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action for an accounting by one partner against another, after dissolution, a consideration of the unsettled accounts of a still earlier copartnership between the same parties, not alluded to in the pleadings, is a matter outside the issue and for that reason may be properly disregarded.

It is the duty of a partner who takes possession of the assets of a copartnership upon its dissolution, for the purpose of winding up its affairs, to do so within a reasonable time. If he neglects to do this and uses the firm property in his own private business, he is, after the lapse of such reasonable time, chargeable with interest on the balance which, upon an accounting, is found due to his copartner.

[Argued January 20th—decided March 2d, 1898.]

ACTION claiming an accounting and judgment for such sum as might be found due thereon, brought to the Superior Court in New Haven County and tried to the court, *Roraback, J.*, upon the defendant's remonstrance to the report of a committee to whom the cause was referred; the court sustained a demurrer to the remonstrance, accepted the report of the committee and rendered judgment for the plaintiff, and the defendant appealed for alleged errors in the rulings of the court. *No error.*

The complaint alleged, in substance, that the plaintiff and

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defendant had been partners in the plumbing business, under a written agreement, from May 28th, 1880 to May 31st, 1882, when the partnership was dissolved; that most of its assets remained in the defendant's hands after the dissolution; that its business and affairs were still unsettled; and prayed for an account.

The answer admitted the existence and dissolution of the copartnership as alleged; that a portion of its assets, after dissolution, had remained in the defendant's hands; denied that defendant had used them for his own benefit, and alleged that he had substantially settled its affairs and was, and always had been, ready to account.

The reply denied all the allegations of the answer, "in so far as they are not admissions of the statements contained in the complaint."

The defendant also filed a cross-complaint, setting up certain facts in relation to the copartnership business carried on between May 28th, 1880 and May 31st, 1882, which he claimed entitled him to the allowance of the sums named in his cross-complaint, in his favor, in the accounting. The answer to this was, in substance, a denial of the matters therein set up.

The material facts found are, in substance, as follows: The plaintiff and defendant formed a partnership, under written articles of agreement, on the 28th of May, 1880, to carry on the plumbing business. They carried on said business as partners from that date until the 31st day of May, 1882, when the partnership was dissolved. During said period the defendant drew out of said firm, over and above his advances, $1,932.99, while the plaintiff during the same time drew out, over and above what he advanced, $1,655.70.

On the first of April, 1882, plaintiff notified defendant that he should withdraw from the firm on June 1st, 1882, and about May 1st, 1882, an attempt was made by the partners to settle their accounts, but they were unable to agree. In May, 1882, both parties made demand upon each other for an accounting, and since that time no demand has been made by either party.

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At the time of the dissolution the assets and liabilities of the firm were as follows:—

ASSETS.

Stock of plumbing materials . . .	$1,048.00
Cash on hand	375.39
Book accounts, afterwards collected . .	729.90
	$2,153.29

LIABILITIES.

Accounts payable, ...	$ 504.46
Balance of assets over liabilities, . .	$1,648.83

After the dissolution all of the books, accounts, assets and property of the firm remained in the possession of the defendant, who assumed the settlement of the business of the firm. Between June 1st, 1882, and January 1st, 1883, he collected accounts of the firm to the amount of $653.78, and paid all the debts of the firm, $504.46. He continued to carry on business as a plumber on the premises which had been occupied by the firm, and the partnership property in his hands was used by him as his own, in his private business, no account being kept of the same. He thus used stock of the firm of the value of $749.66.

Between June 1st, 1882 and January 1st, 1883, the plaintiff collected firm accounts to the amount of $76.12, which he appropriated to his own use. In striking the account between the partners the committee charged both plaintiff and defendant with interest on partnership property actually used by them in their private business, from and after January 1st, 1883. The amount of firm property thus used by the defendant was $1,274.37, and interest was charged to him on that amount from January 1st, 1883, to the date of the committee's report, amounting to $1,113.93; while the amount of the firm property used by the plaintiff was $76.12, and interest upon that sum after January 1st, 1883, to date of report, amounting to $66.53, was charged to him. It was found as the result of the accounting that the defendant owed the plaintiff $1,261.47.

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On the hearing before the committee evidence was offered and received, some of it subject to, and some of it without, objection from the defendant, concerning the affairs of a partnership that had existed between the plaintiff and defendant under a verbal agreement, between February 1st, 1880, and May 28th, 1880. If such evidence was admissible, the committee found with reference to said prior partnership, as follows: —

The plaintiff and defendant did enter into such a copartnership and continued it for the period above named, when they entered into the written agreement of May 28th, 1880. No settlement of the affairs and business of this prior copartnership was made, nor of the accounts of the partners, nor has any been made since, and none was ever asked for by either party. All the assets of this prior partnership went into the new partnership under the written agreement, and all its liabilities were assumed by the new firm. No evidence was offered of the amount of the assets, or liabilities of the old firm. The committee found, however, that the accounts of the plaintiff and defendant with the prior firm, at its close, were as follows: balance of credits over debits in favor of defendant, $1.16; balance of debits over credits against plaintiff, $229.33. The defendant having withdrawn all objection to the evidence on this point, insisted on argument before the committee that the accounts between the parties prior to May 28th, 1880, should be considered by the committee, while the plaintiff claimed that the same were not in issue in the case.

To the report of the committee the defendant filed this remonstrance: "The defendant objects to and remonstrates against the acceptance of the committee's report in the above entitled case, because: (1) It appears that the committee has allowed interest against the defendant Kelly for all material used by the defendant since the dissolution of the partnership from the 1st day of January, 1883, and it does not appear that said Kelly ever used any of the assets of said company or copartnership until long after said date. (2) It appears and is found that there was always a question be-

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tween the plaintiff and defendant as to the amount due between them, and no balance was ever struck between said partners until this report of the committee was filed. (3) Because the accounts between said partners were never liquidated or determined, and the committee has allowed interest from the first day of January, 1883. (4) It appears in evidence and is uncontradicted, that a large amount of the materials left in the possession of said Kelly after the dissolution was used in fulfilling contracts, the amount of which is charged to the defendant Kelly as cash received. (5) It appears that there is still property belonging to the copartnership, and no final accounting can be had until said property is disposed of. (6) The committee has improperly made up the account between the plaintiff and defendant, and has figured the account in an improper manner, because, instead of finding the property belonging to the parties, he has figured and based his conclusions upon the amount drawn out by either party. Wherefore said defendant asks that said report be referred back to said committee that he may correct said account in these respects."

To the remonstrance the plaintiff filed this demurrer: "The plaintiff demurs to the remonstrance of the defendant to the acceptance of the report of the committee: (1) Because the defendant having converted the funds and property of the firm to his own use, is properly charged with interest. (2) Because the defendant having so converted the funds of the firm, and having failed to account for the same, or show the time of the conversion, is chargeable with interest from the time the property was received by him, and is not aggrieved by the charge of interest from January 1st, 1883. (3) Because it is not found that interest has been charged upon balances between the parties, or upon any sum not actually received by defendant and used by him in his business as his own. (4) Because the court has not jurisdiction to review the findings of the committee on a question of fact. (5) Because the fact that there is still property unsold does not present any objection in law for refusal to accept the report of the committee, who could only report

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facts as they are, and has no power to control the sale of the property remaining; and because such fact does not in any way prevent the court from proceeding to final judgment on the report of the committee after such property has been sold by its order. (6) Because the committee has proceeded legally and without prejudice to the defendant in ascertaining the share of each in assets of the firm, and in so doing has properly considered the amounts drawn out by each of the parties. (7) Because each and every of the allegations in said remonstrance is insufficient in the law."

The court sustained the demurrer for the reasons set forth in paragraphs 1, 2, 3, 4 and 5 thereof, overruled the remonstrance, and accepted the report. After this the defendant claimed to the court: (1) that no interest should be allowed upon any part of the sums found due to the plaintiff; (2) that in deciding upon the amount due from the plaintiff to the defendant, the entire account between the plaintiff and defendant from February 1st, 1880, should be considered; (3) that the costs should be divided between plaintiff and defendant. These claims the court overruled.

The errors assigned are the following: 1. The court erred in sustaining the plaintiff's demurrer to the defendant's remonstrance. 2. The court erred in overruling the defendant's remonstrance, and in accepting the report of the committee. 3. The court erred in allowing interest to the plaintiff in any of the accounts, on the facts found by the committee. 4. The court erred, in ruling upon the facts found by the committee, in not considering the entire account between the plaintiff and defendant from the time they commenced business.

William H. Ely, for the appellant (defendant).

The trial court erred in allowing interest. *St. Paul Trust Co.* v. *Finch*, 52 Minn. 342–351; *Gilman* v. *Vaughan*, 44 Wis. 646–649; *Sweeney* v. *Neely*, 53 Mich. 421–424; *Kemmerer* v. *Kemmerer*, 85 Iowa, 193–195; *Gregory* v. *Menefree*, 83 Mo. 413–423; *Brownell* v. *Steere*, 128 Ill. 209; *Lockwood* v. *Day*, 24 Conn. 193. Where both partners are at fault neither should be allowed interest.

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William L. Bennett, for the appellee (plaintiff).

The defendant, in settling up the business of the firm after dissolution, held the assets of the firm in trust, primarily for the purpose of paying the partnership obligations, and, when they were extinguished, to account to his partner for his share of the residue. *Tillotson* v. *Tillotson*, 34 Conn. 358; *Dunlap* v. *Watson*, 124 Mass. 305. If he used the funds and property of the firm as his own in his private business, he is chargeable with interest. *Barrett* v. *Kenney*, 24 Conn. 267; *Woodruff* v. *Bacon*, 35 id. 97–104; *Candee* v. *Skinner*, 40 id. 464; *Dunlap* v. *Watson*, *supra*. Since the defendant has rendered it impossible to tell when he actually converted the property to his own use, interest is to be reckoned against him on all the property converted, from the time of the dissolution of the partnership. *Armory* v. *Delamirie*, 1 Sm. L. Cas. 687, *note*; *Perkins* v. *Hollister*, 59 Vt. 348; *Re Mulholland's Est.*, 175 Pa. St. 411; *Re Noble's Est.*, 178 id. 460; *Wolfert* v. *Reilly*, 133 Mo. 463; *Jackson* v. *Shields*, 87 N. Car. 437; *Norris' Appeal*, 71 Pa. St. 123. The court properly refused to consider the account prior to the formation of the partnership. The matter was not within the issues joined.

TORRANCE, J. Upon this appeal the defendant claims, in substance, that the court below erred: (1) in not considering the partnership matters between plaintiff and defendant prior to May 28th, 1880; and (2) in overruling the remonstrance and accepting the report.

We think there was no error in refusing to consider the facts found with reference to the affairs of the prior copartnership, because these facts were outside of the issues raised by the pleadings. From the pleadings it nowhere appears that any copartnership or other relation had ever existed between these parties, prior to May 28th, 1880. All the allegations, admissions and denials contained in them, relate entirely to the affairs of the copartnership after May 28th, 1880, and contain no allusion or hint of any prior relationship between the parties, or of any prior unsettled accounts

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between them, or of any claim for an accounting for anything prior to May 28th, 1880. All the relief and remedy which the parties, by the pleadings, sought in favor of or against each other, related solely and entirely to the unsettled business of the new firm. Under the circumstances, we think the court below was justified in refusing to consider that part of the report pertaining to the affairs of the old firm.

The principal question raised by the remonstrance, and substantially the only one orally argued before us, relates to the allowance of interest against the defendant. The defendant claims that upon the facts found by the committee he ought not be charged with interest. The committee finds that at the date of the dissolution of the firm in May, 1882, "all the books, accounts, assets and property of the firm remained in the possession of the defendant, who assumed the settlement of the business of the firm."

From the facts found it is clear that the defendant, since the first of January, 1883, has had the use of the cash on hand at the dissolution, amounting to $375.39, and of the balance of accounts collected after paying the debts, amounting to $149.32, and has used the same as his own in his business. It is also clear that he has used in his own business, stock of the copartnership, of the value of $749.66, and there is nothing to show that he had not used this amount of stock prior to the first day of January, 1883. He thus appears to have had the use, and to have used in his business, since January, 1883, money or its equivalent belonging to the partnership, amounting in all to the sum of $1,274.37. He assumed the settlement of the copartnership affairs, and had and assumed substantially the sole and entire settlement of them, and there is nothing to show that they could not have been settled completely and finally prior to, and certainly by, the first of January, 1883. Under these circumstances it was clearly his duty to have settled them within that time, and to have accounted to his copartner for the share of the latter in the surplus. An accounting had been demanded of him in 1882, and in August of that year this suit was brought to enforce it; it was his duty to render it within a reasonable

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time after the dissolution, and the remainder of the year 1882, after the dissolution, might properly be regarded by the committee as a reasonable time for the performance of this duty. Upon the facts found it is difficult to see why the defendant, after January 1st, 1883, was not wrongfully withholding from his copartner money rightfully due to him from the defendant; or why, under such circumstances, the defendant should not be charged with interest. Ordinarily, interest on the balance found due to a partner at the dissolution of a partnership will be allowed from the date of the dissolution, or from such a date as would afford a reasonable opportunity to close up the partnership business. *Allen* v. *Woonsocket Co.*, 13 R. I. 146, 147. A partner who, on the dissolution of the partnership, holds the assets and property of the firm, and is entrusted with the duty of winding up its affairs, is chargeable with interest, as between himself and copartner, if he mingles the money of the firm with his own or neglects unreasonably to settle his accounts. *Dunlap* v. *Watson*, 124 Mass. 305; *Crabtree* v. *Randall*, 133 id. 552; *Robbins* v. *Laswell*, 58 Ill. 203.

The principles laid down in the following cases in our own reports, clearly warrant the allowance of compensation in the nature of interest by way of damages, for the use and wrongful detention of money in a case like the one at bar. *Woodruff* v. *Bacon*, 35 Conn. 97–104; *Regan* v. *New York & N. E. R. Co.*, 60 id. 124–142; *Healy* v. *Fallon*, 69 id. 228.

We are of opinion that interest was properly allowed in the case at bar.

There is no error.

In this opinion the other judges concurred.

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MINNIE MOREHOUSE *vs.* JOSEPH J. MOREHOUSE.

*Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The mere fact that the parties to a divorce suit had spent their winters in New York, is not inconsistent with a finding that the plaintiff had "continuously resided in this State three years next before the date of the complaint," as required by § 2806 of the General Statutes.

The defendant, knowing that his wife had a heart trouble which his conduct would aggravate, frequently appeared before her in an intoxicated condition, humiliated her by his vulgarity and profanity, and abused her with vile and unfounded charges. Aware that he had an infectious disease, he nevertheless solicited and had intercourse with his wife, who was ignorant of his condition, and thereby communicated to her the disease from which she suffered for months. Afterwards, while still having the disease, he again solicited intercourse with her which she refused, whereupon he attempted to accomplish his purpose by violence. As a result of his ill-treatment his wife became seriously and dangerously ill. *Held* that this conduct of the husband constituted intolerable cruelty and justified the trial court in granting her a divorce.

Upon his cross-examination the defendant denied that he had acknowledged his ill-treatment of his wife to one *C*, and thereupon *C* was called in rebuttal to testify to the defendant's admissions. *Held* that the allowance of this evidence in rebuttal rather than in chief, rested in the discretion of the trial court, and that such discretion had not been abused.

The answer of the defendant alleged that the plaintiff had herself been guilty of adultery, and although this allegation was not formally denied upon the record, the parties proceeded with the trial as though it had been denied, and introduced evidence to prove and disprove the truth of the charge. *Held* that the defendant was estopped from claiming that the judgment in favor of the plaintiff was erroneous on account of this formal defect.

[Submitted on briefs, Jan. 21st—decided March 2d, 1898.]

SUIT for a divorce, brought to the Superior Court in Litchfield County and tried to the court, *Ralph Wheeler, J.*; facts found and judgment rendered for the plaintiff, and appeal

*Transferred from first judicial district.

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by the defendant for alleged errors in the rulings of the court. *No error.*

The complaint alleged three grounds of divorce: adultery, habitual intemperance, and intolerable cruelty. The answer denied the main allegations of the complaint, and alleged that the plaintiff had committed adultery. In the judgment the court finds: "(1) That the plaintiff has resided in the State of Connecticut continuously for three years before the date of this complaint; (2) that the plaintiff, by the name of Minnie C. Burchard, was lawfully married to the defendant on the 28th day of June, 1883; (3) that the defendant on divers days between April 1st, 1892, and the date of this complaint, has been guilty of intolerable cruelty to the plaintiff;" and thereupon adjudges a divorce.

The special facts on which the judgment is founded, are found as follows: "1. The plaintiff and defendant intermarried at Danbury in this State, on June 28th, 1883. 2. They have no children. 3. Shortly after their marriage they went to Chatham, New York, to live, and remained there until June, 1890, when they came to Connecticut, where they intended to and did make their home and residence, and where they have ever since resided. From said Chatham they came to Salisbury in this State, and boarded at the Maple Shade Hotel until August 10th, 1891, when they moved into their own home, which had been in the meantime built, in the village of Chapinville in said Salisbury, and both resided there until February 26th, 1896, with the intention of making it their home indefinitely, when the plaintiff left the defendant for the reasons hereinafter stated, and returned to said Danbury, her native place, where she has ever since remained. The defendant has continued his home and residence at said Chapinville, and still resides there. In 1890 the defendant became connected with the Landon Iron Company, having a furnace in Chapinville. Since 1889 the defendant has been connected with a number of other corporations, doing business in different localities, and has had an office in New York City. The plaintiff and defendant, while living together and having their home

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in Chapinville, passed a portion of each year, from December 1st to May 1st following, in New York, where they occupied a leased flat. 4. I find that the plaintiff and defendant have each continuously resided in this State, as aforesaid, since June, 1890. 5. While I do not find that the defendant was habitually intemperate within the meaning of our statute, I do find that he was habitually addicted to the use of intoxicating liquor in large quantities and at times drank to excess, usually at home and out of business hours and under such circumstances as to cause the plaintiff mortification and suffering. The plaintiff used such liquors moderately in a social way and at the table with him. 6. This habit of drinking grew upon him, and was more marked during the last few years of their married life, and was to a considerable extent the cause of his conduct and treatment of her hereinafter found. 7. Her remonstrances in respect to his habits were of no avail. He persisted in them, well knowing the consequences, and fully aware of the effect upon her his conduct and treatment so caused. 8. In 1891 or 1892, the plaintiff became affected with a heart trouble, functional in its nature, which continued thereafter as long as she lived with him, and which was often seriously aggravated by his abuse and ill-treatment of her. 9. The plaintiff is a lady of culture and refinement. 10. The defendant, when under the influence of liquor, as he very frequently was, was vulgar, profane, brutal and jealous. 11. When under the influence of liquor he frequently, and particularly during the last three years of their married life, used towards his wife, and in her presence, violent, abusive, profane and obscene language, was persistently unkind to her, and on several occasions falsely accused her of being unchaste and unfaithful to him. 12. When sober the defendant was not jealous of his wife, and had perfect faith in her innocence and fidelity. 13. The plaintiff has always been a faithful wife. 14. The defendant was fully aware of the nature and extent of his wife's heart trouble, and well knew that his ill-treatment of her would aggravate it and make her seriously ill. Still he continued to humiliate her

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by his vulgar and profane language; abused her shamefully with vile and unfounded charges; and at times resorted to brutal violence when she was ill and he knew it, thereby knowingly aggravating her illness. On very many occasions his ill-treatment made her ill, a result which he knew would follow such treatment. 16. The defendant has a slight congenital phimosis, a fact which he concealed from his wife while they lived together. 17. In 1891, by reason of neglect and uncleanliness on his part, he had from this cause an attack of acute ballinitis with some complications, and from that time on, and particularly and almost constantly in 1895 and in 1896, until she left him, he had recurring attacks of the same disease due to the same causes and in an aggravated form with considerable inflammation and copious discharge, notwithstanding the fact that he was under medical treatment for the disease. 18. The radical cure for phimosis, which was advised by his physicians, is circumcision, a simple and speedy method, and one causing the patient little pain and annoyance. 19. Ordinary care and cleanliness of person would have avoided these attacks of ballinitis. 20. This disease was infectious, and could be communicated to his wife by intercourse, and he well knew it. 21. In June, 1895, while he had this disease and he knew it and his wife did not know it, he had intercourse with her at his own solicitation, and communicated to her the disease, resulting in acute urethritis and vaginitis and later in chronic catarrhal endometritis, which disease caused her great fright and fear and intense and long-continued suffering, and very seriously impaired her health. She was necessarily subjected to medical treatment for months, and was not cured of the last named disease until after she left him. 22. After the defendant communicated to the plaintiff in June, 1895, the diseases aforesaid, and she became aware of the fact, as she did almost immediately, she did not cohabit with him or permit him to have intercourse with her, although he frequently solicited intercourse, notwithstanding the fact that he then had this same disease and she was still suffering from the diseases communicated to her by him as stated, all of which

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he well knew. During a part of this time she occupied the same bed with him. 23. In February, 1896, he came home from a business trip in an intoxicated condition, still having this disease, and solicited intercourse with her, and, on her refusal, insisted and attempted to accomplish his purpose with actual violence. He took hold of her throat with one hand and held her down on the bed with the other, and only desisted from further violence when the plaintiff threatened to call for help. 24. As the result of this treatment the plaintiff was made ill for some days; she had a nervous chill and was very sick all night. 25. In November, 1895, the plaintiff had been ill for some time because of his ill-treatment. When she was so ill, he abused her all night long with profane and violent language, so that she had no sleep whatsoever. On the following morning he continued his abuse and went to her bed where she lay, raised up with pillows, took hold of her shoulders and violently pushed her over on the bed, saying that he wished he could never see her face again; he hoped that she would lie there and suffer until her eyes dropped out; at the same time using very profane language. He also at that time accused her of being untrue to him in many instances and said that she was diseased and that he hoped he would never see her again. 26. As the result of this treatment the plaintiff was made seriously and dangerously ill; had bad fainting spells all that day and for two days thereafter; and her condition became most serious and her life was endangered. Her illness thus caused continued for a long time, and she had not recovered from it and the effects of his ill-treatment last mentioned at the time she left him. 27. The defendant was well aware of the necessary result of all of his conduct and ill-treatment aforesaid, and well knew that her health would be most seriously endangered thereby. 28. The defendant's treatment of the plaintiff became and was intolerable; and on February 26th, 1896, she left him under just apprehension of great danger to her life, health and person. 29. The allegation in said complaint, that the defendant on divers days between April 1st, 1892, and the date of the writ, has been

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guilty of intolerable cruelty to the plaintiff, is found to have been fully proved. 30. The allegation contained in the 3d paragraph of the defendant's answer is found to have been disproved. 31. The allegations of habitual intemperance and adultery, contained in the plaintiff's complaint, are not proved as grounds of divorce. 32. Upon the foregoing facts the defendant claimed, as matters of law, that the acts of the defendant did not constitute intolerable cruelty within the meaning of the law, and that the facts do not constitute residence for either plaintiff or defendant within this State, as required by the statute; and that the plaintiff had not resided in the State of Connecticut continuously the length of time required by the statute to entitle her to maintain this action. 33. The court overruled such claim and held and decided that such acts did constitute intolerable cruelty under the law, and that the parties had resided within the State the requisite length of time. 33½. The defendant's counsel also denied that the plaintiff's residence had been and was that of the defendant, who resided in the city, county and State of New York. The court found as a fact that the defendant had resided in this State continuously from August 10th, 1891, to the day of trial, and also found and held that the plaintiff had also so resided with the defendant. 34. Thereupon the court rendered judgment granting to the plaintiff a divorce on the ground of intolerable cruelty, with change of name as prayed for."

Upon the trial the defendant charged one Herbert N. Curtis with having improper relations with his wife; and upon cross-examination denied having any business relations with Curtis since January, 1895, and denied having made certain admissions as to his own conduct to his wife. The plaintiff produced Curtis in rebuttal, for the purpose of contradicting the defendant, and for the purpose of proving the defendant's admissions as to his habits and ill-treatment of his wife. To this evidence counsel for the defendant objected, on the ground that the statements of the defendant sought to be contradicted were made on cross-examination, and that the plaintiff had made the defendant her own witness. The evidence was admitted and the defendant excepted.

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The witness Curtis was also offered in rebuttal for the purpose of proving the time, place and circumstances of each interview he had had with the plaintiff since she left her husband. The evidence was objected to and admitted. The defendant excepted.

The appeal contains numerous objections to the facts found by the trial court; and assigns errors in law in the rulings of the court that the facts found established "continuous residence," and that the facts found established "intolerable cruelty;" and in the admission of testimony.

Donald T. Warner and *Leonard J. Nickerson*, for the appellant (defendant).

Samuel Tweedy and *Eugene C. Dempsey*, for the appellee (plaintiff).

HAMERSLEY, J. The plaintiff and defendant have lived in this State since June, 1890. The court finds that when they came to Connecticut they intended to make their home here. There is nothing in the evidence certified at request of both parties, to indicate that this finding violates any principle of law. Having made this State their home, the fact of spending their winters in the city of New York is not inconsistent with their continued residence here; and the court did not err in finding that the plaintiff had, as required by statute, "continuously resided in this State three years next before the date of the complaint." General Statutes, § 2806.

The defendant claims that the facts found by the court do not constitute "intolerable cruelty." When our legislature, in 1843, adopted as grounds of divorce *a vinculo*, "habitual intemperance" and "intolerable cruelty," it used these words with their ordinary meaning, but with special reference to what had been since 1639 our settled policy in respect to divorce; *i. e.*, marriage is a life status and should never be dissolved, unless one of the parties is guilty of conduct which in itself is a practical annulling and repudiation of the marriage

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covenant. Wilful desertion for such a length of time as the statute says shall conclusively prove a permanent abandonment and repudiation of all marital rights and duties, had been a ground for divorce. Following this analogy the legislature, in 1843, made grounds of divorce: intemperance so long continued that the fixed habit renders the party incapable of performing the duties of the marriage relation; and cruelty of such a nature as to be intolerable, and to render a continuance of the relation by the suffering victim impracticable. *Dennis* v. *Dennis*, 68 Conn. 186, 192. Mere faults of temper and of manner do not constitute such cruelty. There are disagreeablenesses and trials causing much weariness and suffering which parties to the marriage contract must bear; the policy of the State, as well as the sacred nature of the marriage covenant, requires patient endurance. But there are injuries and insults which are outside the pale of that covenant; submission to which was never contemplated, and which are not to be borne. No complete definition can be given, because the exhibitions of cruelty cannot be forecast.

In the present case it appears that the defendant treated his wife, a lady of culture and refinement, as follows: Knowing that she was affected with a heart trouble and that his conduct would aggravate it, he frequently appeared before her in an intoxicated condition, humiliated her by his vulgar and profane language, and abused her with vile and unfounded charges. On many occasions his conduct made her ill, a result which he knew would follow such treatment. While affected with an infectious disease, which he knew could be communicated to his wife by intercourse, he solicited intercourse (she being ignorant of his condition) and communicated to her the disease, from the effect of which she suffered for months. Afterwards, while still having this disease, he solicited intercourse with her and, on her refusal, insisted and attempted to accomplish his purpose with actual violence. As a result of the defendant's treatment of her, the plaintiff was made seriously and dangerously ill.

This is intolerable cruelty. The mere statement of such

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conduct demonstrates its character. *Mayhew* v *Mayhew*, 61 Conn. 233; *Brown* v. *Brown*, L. R. 1 P. & D. 46; *Kelly* v. *Kelly*, L. R. 2 P. & D. 31.

The testimony of the witness Curtis relative to conversations with the defendant, was admissible for the purposes for which it was offered. If it should be regarded as strictly evidence in chief, its admission in rebuttal was a matter of discretion, and the discretion was not abused.

It is difficult from the record to see how the testimony of Curtis as to his interviews with the plaintiff after she had left her husband, was material; the evidence given, however, could not have injured the defendant.

The defendant claims in argument that the judgment is erroneous, because the record does not show a formal denial of the allegation in his answer charging the plaintiff with adultery; that the allegation is therefore admitted and constitutes a bar to the action. This claim was not made in the court below, and is not distinctly specified in the reasons of appeal. The allegation was treated by the parties upon the trial as denied; evidence tending to prove it was offered by the defendant and contradicted by the plaintiff, and it is found by the court to have been disproved. Moreover, by going into any trial the defendant treated the allegation as denied; if, as he now claims, the adultery of the plaintiff was admitted upon the record, he was entitled to a judgment without trial. He is estopped from now making this claim.

The errors claimed to have been made by the trial court in finding from the evidence its conclusions of fact, cannot be considered. *Thresher* v. *Dyer*, 69 Conn. 404, 408.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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FRANCIS J. McKEON *vs.* AARON H. BYINGTON. 70 429 75 248

Third Judicial District, New Haven, Jan. Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The Superior Court has jurisdiction to determine the correctness of the rulings made by its committee, when such rulings are fully set forth either in the report of the committee or in a remonstrance against the acceptance of such report.

There is no occasion to recommit the report to the committee, if all the questions an aggrieved party desires to raise are sufficiently stated in his remonstrance.

Errors not specifically assigned in accordance with the rule, will not be considered by this court upon appeal.

In his complaint the plaintiff sought to recover for clothes made and furnished for the use of the defendant and his sons, "the same being for their support," under an agreement that the defendant would pay the amount due on the account, on demand. *Held* that an objection to the allowance of a charge of $31, on the ground that it was for a suit of clothes ordered by the defendant for the use of one *O*, was a mere technicality devoid of merit, and was properly disregarded by the committee. *Held* also, that as all the clothes were furnished on the order and credit of the defendant, the question whether the clothes furnished to the sons were for their support, was immaterial.

The plaintiff occupied a store of the defendant, and it was agreed between the parties that the rent as it became due should be applied upon the plaintiff's account for clothes. The last rent became due April 1st, 1882, when the defendant owed the plaintiff a large amount. *Held* that the application of the rent to the plaintiff's bill was a payment by the defendant on that date, which prevented the statute of limitations from running against the plaintiff's claim until that time. *Held* also, that inasmuch as the mutual accounts ceased April 1st, 1882, the plaintiff was entitled to interest by way of damages, upon the balance due him, from that date to the date of judgment.

[Submitted on briefs Feb. 15th—decided March 24th, 1898.]

ACTION to recover the amount of a tailor's bill, brought to the Superior Court in Fairfield County and tried to the court, *George W. Wheeler, J.*, upon the defendant's remonstrance to the report of a committee in favor of the plaintiff; the court overruled the remonstrance and afterwards ren-

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dered judgment (*Shumway, J.*) for the plaintiff, and both parties appealed for alleged errors in the rulings of the court. *No error on defendant's appeal; error on plaintiff's appeal.*

The complaint in this case was in the nature of an action of assumpsit. The plaintiff was a merchant tailor. The bill of particulars was for goods sold and for work and labor, such as an artisan of that kind would ordinarily furnish to his customers. The answer was, first, a general denial; second, that the cause of action did not arise within six years next before the suit was brought. The reply denied the matters set up in the second defense, and also alleged that within six years before the commencement of this suit the defendant had undertaken and promised to pay to the plaintiff the amount of his bill. The rejoinder denied this last matter.

There was also a counterclaim pleaded by the defendant, the bill of particulars under which set out the use and occupation of rooms at a certain rent; also work and labor in advertising in a newspaper. The plaintiff denied all the matters alleged in the counterclaim.

The cause was referred to a committee, who reported as follows: "(1) The plaintiff, from September 13th, 1867, to April 1st, 1882, was a merchant tailor, doing business in Norwalk, Conn., in a store which he rented from the defendant. (2) The rental price agreed upon was $200 per year, payable quarterly. The plaintiff paid his rent in cash to April 1st, 1868. After that time he paid nothing. (3) On October 17th, 1867, the defendant had four minor sons. (4) Upon said last mentioned date he opened an account with the plaintiff, directing him to make clothing as it should be ordered for himself and his sons, and to charge the same to him. He never revoked this direction. (5) The defendant, in June, 1868, ordered the plaintiff to supply Edward Owens with a suit of clothes and charge the same to the defendant. The plaintiff complied with said order. The clothing so furnished was of the price and value of $31, and has never been paid for. (6) Between October 17th, 1867,

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and November 6th, 1878, the plaintiff made and delivered to the defendant and his sons, clothing of the price and value of $4,213.50. (7) An account for repairing in addition to the amount above allowed, was presented to me, but while I am satisfied that the repairing was done, no reliable evidence of the amount or value of the same was furnished, and I am unable to fix upon any amount due therefor. (8) The plaintiff also presented an account for the care of a lamp which was kept lighted in the hall of the building in which his store was located. I find that said lamp was placed there by the plaintiff himself, and that the defendant never agreed to pay anything for its care. (9) The defendant has paid in cash or its equivalent, $365 upon the plaintiff's account. No part of said amount was paid within six years prior to the bringing of this action. (10) At all times since April 1st, 1868, the account of the plaintiff for clothing has exceeded the account of rent due. (11) While the plaintiff was in occupancy of said store the parties agreed verbally, in the year 1874 or year 1875—not later than the year 1875—that the rent should be applied as it should become due, as payment on the account. (12) The last rent became due on April 1st, 1882. (13) On April 1st, 1882, there was due to the plaintiff $1,079.50 (exclusive of interest and inclusive of the suit for Owens), after deducting said $365 and $2,800 for rent. (14) No part of said sum has ever been paid to the plaintiff. (15) The plaintiff did not present annual statements of his account to the defendant, but at various times he sent bills to him. Said bills were not correct in amount, and the parties never agreed as to the balance due. (16) On some day subsequent to April 1st, 1882, while the parties were attempting to arbitrate their differences, the defendant requested the plaintiff to give him his account; the plaintiff accordingly called at the defendant's house and presented to him his account (as he claimed it). The defendant denied that he owed the plaintiff anything, but he then stated to the plaintiff that if he owed him anything he would pay him every cent he owed. (17) I find that the defendant's claim for advertising, set forth in his counterclaim, is not proven."

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When this report was filed in court the defendant remonstrated against its acceptance. The plaintiff denied all the allegations contained in the remonstrance. The court, after a full hearing, overruled the remonstrance, accepted the report, found the facts therein stated to be true, and rendered judgment for the plaintiff to recover of the defendant the said sum of $1,079.50 damages and his costs. From this judgment both parties have appealed.

Edward M. Lockwood, *J. Belden Hurlbutt* and *Henry W. Gregory*, for the appellant (defendant).

Joseph A. Gray, for the appellant (plaintiff).

ANDREWS, C. J. Where a case is referred to a committee for a hearing and finding thereon, the committee may report in detail all the proceedings which occur at the hearing,—all the objections taken and all the interlocutory questions made, with the rulings thereon—as well as the findings upon the issues in the case. If this is done, a party who is aggrieved by any of these rulings has them spread on the record, so that when the report comes up for acceptance he can ask the court to pass upon them. But sometimes the committee reports only the ultimate facts found. If this is done, a party who has been aggrieved by any rulings at the hearing sets forth in a remonstrance all those rulings and questions of which he complains, and in that way spreads them upon the record, and thus enables the court to determine upon their correctness. In the present case the latter course was taken.

It is certainly within the jurisdiction of the Superior Court to decide upon a report which its own committee has made to it; so that there is nothing erroneous in the first reason of appeal. And as on his remonstrance the defendant had the benefit of all the questions he desired to raise, there was no need of sending the report back to the committee. There is, therefore, no error in the fifth and sixth reasons.

The rule in respect to the assignment of errors, requires

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that the precise matter of error, or defect in the proceedings in the court below, relied on as ground of reversal, must be set forth. No others will be considered by this court. Rule XVI, 58 Conn. 584. Several of the reasons do not conform to this rule. They present no questions which this court can consider. Of this kind are the second, third, fourth, seventh, eighth, twentieth and twenty-fifth reasons.

The ninth, tenth and eleventh reasons have reference to a suit of clothes furnished by the plaintiff on the written order of the defendant and delivered to one Owens; the price of which was $31. The defendant now argues that this sum ought not to be charged against him in this suit, because the clothes were to be worn by one Owens, while the complaint asks to recover only for clothes furnished to the defendant and his sons. We think the committee properly disregarded a technicality so thin and so devoid of merit as that.

The twelfth, thirteenth and sixteenth reasons assign as error that it is not found that the clothing furnished to the sons of the defendant was for their support. It is stated in the report that the defendant had four minor sons for whom clothing was furnished. Ordinarily clothing furnished to a minor child on the order of the father would be assumed to be for its support. It does not appear that any of these sons became of full age while this account was being incurred; and as all the clothing was furnished on the order of the father, the question of support is not material. There is no error in these assignments.

It seems probable that the fourteenth reason does not clearly express the thought of counsel. Whether or not the plaintiff made and delivered clothing to the defendant's sons, was expressly in issue by the terms of the complaint and the bill of particulars. The same probability seems to attach to the fifteenth reason. It assumes that the defendant was not liable for the clothing furnished to his sons, a conclusion exactly contrary to the facts found. The same criticism also applies to the seventeenth reason because it assumes, contrary to the fact, that the verbal order given by the defendant to the plaintiff, in 1867, was an agreement to answer for

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the debt of another. There is no error in any of these assignments. Nor is there in the eighteenth. The fact that two of the defendant's sons went away from his home, did not revoke his order to the plaintiff to furnish them with clothes. Besides, there is no evidence that the plaintiff had any knowledge that they were absent. The nineteenth reason is evidently an inadvertence. The court ruled in accordance with the defendant's claim.

The twenty-first, twenty-second, twenty-third and twenty-fourth reasons, each refer to the new promise which the plaintiff alleges the defendant had made.

The defendant set up in his second defense that the cause of action stated by the plaintiff did not accrue within six years next before the commencement of this action. The plaintiff denied this defense. An examination of the record shows that this defense was not sustained. The committee's report says, in paragraph eleven, that the parties agreed that the rent of the store should be applied as it should become due, as payment on the account. It appears by the bill of particulars that the rent had been in fact so applied, and in paragraph twelve, that the last rent became due on the 1st day of April, 1882. By the agreement this was a payment by the defendant of the amount of the yearly rent, and one which should be credited on that date. "In a matter of account, every proper item of credit on one side is presumed to be intended, and will therefore operate, as a payment upon existing debits on the other. The account is an entirety. The items of debt and credit are the elements of which that entirety is composed. Credits on one side are applied to the extinguishment of debits on the other, as payments intentionally made thereon, and not as set-off of one independent debt against another." *Sanford* v. *Clark*, 29 Conn. 457, 462. This was a payment which prevented the the statute of limitations from running till that day. The action was brought on the 27th day of March, 1888, and within six years after that payment.

It is very possible that the facts found were sufficient to establish a new promise; but we have no occasion to pass

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upon these, because the statute of limitations had not then run against the account. There is no error on the defendant's appeal.

There is, however, error on the plaintiff's appeal. The plaintiff is entitled to have interest on the sum of $1,079.50 from the first day of April, 1882. The mutual accounts ceased on that day, and he is entitled to have damages from that date to the date of judgment. The case must be remanded to have interest computed for that time; and then judgment should be rendered for the plaintiff to recover the amount.

Error on plaintiff's appeal, and case remanded.

In this opinion the other judges concurred, except HAMERSLEY, J., who dissented as to the allowance of interest.

TOWN OF NEW MILFORD *vs.* COUNTY OF LITCHFIELD.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A county cannot escape its liability to a town for one third of the expense incurred by the latter for the permanent improvement of its highways, under Chap. 315 of the Public Acts of 1895, merely because it has no money in the treasury wherewith to pay the obligation. It is the duty of the county authorities to provide funds to meet its statutory liabilities.

[Submitted on briefs March 1st—decided March 24th, 1898.]

ACTION to recover one third of the sum expended by the plaintiff town for the permanent improvement of one of its highways, brought to the Court of Common Pleas in Litchfield County and reserved by that court, *Welch, J.*, upon a finding of facts, for the consideration and advice of this court. *Judgment advised for plaintiff.*

Frederic M. Williams and *Donald T. Warner*, for the plaintiff.

The defendant seeks to avoid the payment of this debt on

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the plea that it has no money in its treasury "not otherwise appropriated," with which to pay it. Its duty is to put money in its treasury. *Terry* v. *Milwaukee*, 15 Wis. 492; Tied. on Mun. Corp. p. 326 and cases there cited. The plaintiff was not bound to request that a tax be levied to replenish the treasury, before bringing the suit. Tied. Mun. Corp. § 180, and cases cited in note 1; *Mills Co. Bank* v. *Mills Co.*, 67 Iowa, 697; 25 Amer. & Eng. Ency. of Law, p. 584. It cannot be presumed that the county will violate its duty and refuse to lay the necessary tax. *Lyell* v. *Lapeer Co.*, 6 McLean, 446; *State* v. *Clay Co.*, 46 Mo. 231. The plain and direct imposition upon the county, in the 6th section of the Act, is not negatived or affected by the language in the 7th section, whether the latter be treated as meaningless, surplusage, or merely permissive and directory. In *Campbell* v. *County of Polk*, 3 Iowa, 467, the court (on page 471) says: "In a warrant payable like these, from any money not otherwise appropriated, what do the words 'not otherwise appropriated' mean? There is reason to doubt whether they mean anything."

Albert P. Bradstreet and *Samuel A. Herman*, for the defendant.

Towns alone have express power to construct and maintain highways, and if any are constructed pursuant to the provisions of Chap. 315, Public Acts of 1895, and the county treasury has money in it not otherwise appropriated, they will receive their share, or proportionate share; *otherwise not.* This right of action being purely statutory, the plaintiff is restricted to the remedy provided by the statute. *Pollard* v. *Bailey*, 20 Wall. 378; *Dudley* v. *Mayhew*, 3 N. Y. 9; 1 Wait's Act. & Def. 42; 2 id. 109; *Storms* v. *Stevens*, 3 N. E. Rep. 401; *Ryan* v. *Ryan*, 4 id. 217; *Walker* v. *Commissioners*, 38 id. 1095; *Remick* v. *Morris*, 7 Hill, 576; *Stafford* v. *Ingersoll*, 3 id. 41. There is no statutory method by which money can be covered into the county treasury for the general purposes of the county, save through the tax levying power vested in the senators and representatives.

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Gen. Stats. § 1985. The county commissioners would have been obliged to borrow the money to meet the demands of the plaintiff; and this power to borrow money has never been vested in the county by statute, and consequently cannot be invoked. *Mayor* v. *Ray*, 86 U. S. 164; 1 Dill. Mun. Corp. 488.

ANDREWS, C. J. The legislature, at its session in 1895, passed "An Act to Provide for the Improvement of Public Roads." Chap. 315, Public Acts of 1895, p. 655. It provided that any town in the State might, in each year, by pursuing the steps therein named, improve a portion of its public roads, and in section six said: "When any road shall be constructed under this Act, one third of the cost of said construction shall be paid for out of the State treasury; . . . one third of the cost shall be paid for out of the treasury of the county within which such road is constructed; and one third of the cost shall be paid for out of the treasury of the town within which such road is constructed." Section seven of the said Act provides that the selectmen of the town within which any such road has been constructed, shall file a certificate of the cost thereof with the highway commissioners of the State; and that the said highway commissioners shall file a certificate with the county commissioners of each county, between December 15th and 31st of each year, and that "said certificate shall state the amount of money due the various towns by the county for the construction and permanent improvement of roads under this Act, and the county commissioners shall cause to be paid to the towns said money as set forth in said certificates out of any money in the treasury of the county not otherwise appropriated."

The complaint in this action in its first count alleges that the town of New Milford, in the year 1895, did permanently improve a portion of its public roads pursuant to the provisions of said Act, and expended in such improvement the sum of $2,940; and that all the steps were taken and things done which entitled it to receive, and made it the duty of the County of Litchfield to pay to it, one third of the said

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amount, to wit, the sum of $980. In the second count the complaint alleges a like liability upon the county to pay plaintiff for money expended in the year 1896, the sum of $950. It is also alleged that there was in the county treasury money not otherwise appropriated, sufficient to pay the said sum, and that a demand had been made on the county commissioners for the payment thereof, and that the same had never been paid. Damages are demanded for the non-payment of both of said sums.

The answer avers that at the time the said demand was made on the county commissioners there was not, nor was there at any time prior to the bringing of this suit, in the treasury of the county or due to the county, the said sums of money nor any part thereof, not otherwise appropriated.

The trial court found all the allegations of the complaint to be true, except the allegation that there was sufficient money in the treasury; and upon this part of the case found the averment of the answer to be true, and thereupon reserved the cause for the advice of this court. The reservation is in these words: That if, as matter of law, the defendant county is liable in the premises to the plaintiff town, then the plaintiff shall recover of the defendant the said sum of $980 under the first count, and the further sum of $950 under the second count, and costs.

The statute above referred to, in its sixth section, imposes in terms on the defendant county, under the state of facts found by the trial court to be true, an absolute liability to pay to the plaintiff town the sums of money demanded. And in its seventh section it empowers the county commissioners to discharge that liability. It is admitted, at least it is not denied, that the conditions are found by the court to exist which create the liability. The sole reason suggested in the record, or urged by the eminent counsel for the defendant in their brief, why this liability to pay the amounts does not attach and why judgment should not be rendered for the plaintiff against the county, is that there is no money in the county treasury. And they argue that because there is no money in the treasury there is therefore no liability to pay.

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The want of money in the treasury can only be owing to the omission of the proper authorities to levy and collect the necessary tax. So the argument comes to this: Because the county authorities have neglected to provide money sufficient to meet its liabilities, there is no liability. In other words, that the defendant may gain an advantage by its own omission of duty. An argument of that kind is so obviously untenable, that when it is stated it is already refuted. The neglect or omission to provide money can never absolve a public corporation from the duty to discharge a statutory liability. *Whitney* v. *New Haven*, 58 Conn. 450, 461; *State* v. *Staub*, 61 id. 553, 562; *Williams, State's Attorney* v. *New Haven*, 68 id. 263, 272.

The Court of Common Pleas for Litchfield County is advised to render judgment for the plaintiff town.

In this opinion the other judges concurred.

HARRY NICHOLS *vs.* CORNELIUS PECK.

HARRY NICHOLS *vs.* FRANK HUTCHINSON.

HARRY NICHOLS *vs.* LEVI HUTCHINSON.

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First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The owner of a right of way may do whatever is reasonably necessary to make the way suitable and convenient for his use; but cannot justify a material deviation from the established route, merely because its entrance has become impassable owing to a lawful change in the grade of the highway.

A way by prescription which runs in a defined course to a fixed point, is no more subject to variation by parol agreements or by acts and conduct, than if it had been created and so described by deed.

As matter of law, a way opening upon a highway through a certain gate cannot be regarded as substantially identical with a way joining a highway through another gate seventy feet distant.

A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error.

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The defendant, having a right of way by prescription over a farm which the plaintiff contemplated buying, was asked by the plaintiff, if he, the defendant, had "a regular right of way" over it, and answered in the negative. He was not informed of the purpose of the inquiry and had no intention of misleading the plaintiff; nor did it appear that the latter relied upon the statement in purchasing the farm. *Held* that under these circumstances the defendant was not estopped by his reply from asserting his right of way.

Where a trespass *quare clausum fregit* is jointly committed, the wrongdoers should ordinarily be sued jointly, and if sued severally, without due cause, the actions should be consolidated.

[Argued March 1st—decided March 24th, 1898.]

ACTION in the nature of trespass *quare clausum fregit*, brought originally before a justice of the peace and thence by the plaintiff's appeal to the Court of Common Pleas for Hartford County, and tried to the court, *Calhoun, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the ruling of the court. *Error and new trial granted.*

Two other cases—*Nichols* v. *Frank Hutchinson* and *Nichols* v. *Levi Hutchinson*—identical in their facts, were tried and argued with the foregoing case.

In the Court of Common Pleas the defendant in each case pleaded in justification a right of way by prescription in favor of the defendant Peck, under whose instructions the other defendants made their entry. This way extended from the highway to a lot owned by the defendant Peck, known as the Jones lot. The reply denied any such right, but admitted that the defendant Peck owned the Jones lot, and that there was no mode of access to it except over the plaintiff's land. It also set up, as an estoppel *in pais*, that the plaintiff bought his land in 1892 on Peck's assurance that he did not claim any right of way over it to the Jones lot.

The facts were specially found, and are sufficiently stated in the opinion.

Cornelius J. Danaher, for the appellant (plaintiff).

Charles H. Sawyer, for the appellee (defendant).

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BALDWIN, J. In 1885 the defendant Peck had acquired, by an adverse user of forty years, a prescriptive right to a way about forty-three rods in length, over a farm now owned by the plaintiff, between a certain lot called the Jones lot, which was wholly inclosed by that farm, and the highway. The way was not defined by any worn track, but had always been traveled in substantially the same course, running for half its length through a narrow swale, and connecting with the highway through a certain bar-way. In that year the grade of the highway was so lowered by the town authorities as to make the bar-way useless, whereupon the then owner of the farm closed it, and opened a new entrance from the highway, by a bar-way set over seventy feet south of that formerly existing. For seven years thereafter the defendant used the new bar-way as belonging to his way, adversely, under a claim of right. Then the plaintiff bought the farm, and for four years more Peck continued to use the new bar-way, with his express approval. At the end of that period the plaintiff chained up and padlocked the gate of the bar-way, and now sues Peck for breaking the chain in order to get access to his lot.

The owner of land which is subject to a right of way, is not bound (unless by virtue of some agreement) to keep the way in repair, or to be at any expense to maintain it in a passable condition. The owner of the right of way may repair it, and do whatever is reasonably necessary to make it suitable and convenient for his use.

When the old bar-way became useless, it was therefore the right of Peck to lower it and alter the level of his way to correspond with the new grade of the highway. *Smith* v. *City Council*, 19 Ga. 89. He preferred to make use of another bar-way set up by the owner of the farm, over seventy feet distant from the prescriptive bounds of his way; and to this no objection was made for eleven years. When the plaintiff chained up the gate, however, and locked it, he sufficiently manifested his intention that this use should be continued no longer, and effectually revoked any license implied from his previous conduct. *Res ipsa loquitur*. *Foot* v. *New Haven & Northampton Co.*, 23 Conn. 214, 223.

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A way by prescription which runs in a defined course to a fixed point, is no more subject to variation by parol agreements or by acts and conduct, than if it had been created and so described by deed.

The finding of the trial court, that the way used from 1885 to 1896 was substantially the same as that used from 1845 to 1885, is an inference from facts which do not warrant it. The law cannot regard a way joining a highway through a certain gate, as substantially identical with a way joining it through another gate seventy feet distant. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error. *Winsted Hosiery Co.* v. *New Britain Knitting Co.*, 69 Conn. 565, 575; *Nolan* v. *New York, N. H. & H. R. Co.*, 70 Conn. 159.

The right of way which existed in 1885 exists still. The disuse of the part which followed the change of the grade of the highway, arose from circumstances which exclude any inference of an intent to abandon that part, unless by exchanging it for another way, the right to which should be equally secure. Such an abandonment might have been presumed, if Watrous, who owned the farm in 1885, had then given Peck a deed of the right to use the new bar-way; or had Peck's user been continued, adversely, and under a claim of right, for fifteen years. But so long as it had no other justification than an implied license, or acquiescence for a shorter term, it could not avail to extinguish his original prescriptive right. Different rules might apply where one location of a highway is abandoned for another, substituted for it by acts of dedication, since a dedication once accepted is irrevocable. Jones on Easements, § 429.

The defendant's remedy, when he found the gate chained against him, was to have recourse to the way he owned, and cut it down, at the point where the old bar-way was, to the grade of the highway. *Reignolds* v. *Edwards*, Willes, 282.

The entrance from the old bar-way became impassable by the lawful act of the public authorities. The owner of the farm only closed it after it had thus become useless. Had

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he, without such cause, wrongfully closed it, in order to prevent its lawful use by Peck, and then allowed him for eleven years to pass through the new bar-way, it may be that in such case the latter could not have been excluded from that mode of access to his way, unless reasonable notice of the intended revocation of license had been previously given. *Hamilton* v. *White*, 1 Seld. 9. But as things stood, the defendants were guilty of a technical trespass in forcing their way through.

With respect to the claim of estoppel, it is found by the trial court that before the plaintiff bought from Watrous they asked Peck if he had "a regular right of way" over the farm, to which he replied in the negative; but that he was not informed of the purpose of the inquiry, and answered it with no intention of misleading; nor did it appear that the plaintiff relied upon the statement in completing his purchase. The question being, not whether he had a right of way, but whether he had a regular one, was calculated to direct his attention only to the particular description of his right, and he might well have thought that a way acquired by adverse user was not entitled to the name of "regular." No estoppel can be founded on his reply. *Danforth* v. *Adams*, 29 Conn. 107.

We perceive no reason for bringing separate suits against the Hutchinsons. If the plaintiff desired to establish his title against them also, he should have joined them as co-defendants with Peck. The three suits will be treated as consolidated in this court, and costs taxed in favor of the appellant in one, only.

There is error in the judgment appealed from.

In this opinion the other judges concurred.

NOTE. A single, consolidated judgment having been entered in favor of the appellant in the above entitled causes, his counsel (*Cornelius J. Danaher*) appeared at the May term, 1898, of this court at Hartford, and moved that an order might be passed requiring the clerk to refund to the appellant the record fees of $25 paid by him in two of the three cases. The court were of the opinion that the controversy could and should have been determined in one action, and denied the motion.

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HIRAM G. LOOMIS *vs.* CHARLES E. PERKINS ET AL.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Great weight is due to the action of the trial court in setting aside a verdict as against the evidence, and this court will not feel justified in reversing such decision unless there are reasonably strong grounds requiring it to be done.

The evidence in the present case reviewed and the action of the trial court in setting aside the verdict sustained.

[Submitted on briefs March 1st—decided March 24th, 1898.]

ACTION to recover for services as a surveyor and civil engineer, brought to the Court of Common Pleas for Hartford County and tried to the jury before *Case, J.;* the jury returned a verdict for the plaintiff, which the court, upon motion of the defendants, set aside and granted a new trial, from which action of the court the plaintiff appealed for alleged error. *No error.*

Roger Welles, for the appellant (plaintiff).

Joseph L. Barbour, for the appellees (defendants).

ANDREWS, C. J. The plaintiff brought his action against the defendants in the Court of Common Pleas in the county of Hartford. In his complaint and in his bill of particulars he alleged that they were jointly indebted to him in the amount therein stated, and claimed a joint judgment therefor. The defendants denied their liability. The case was tried to a jury and the plaintiff had a verdict. The judge refused to accept the verdict and returned the jury to a second and a third consideration, and then accepted it as it is recorded. The court then upon motion set aside the verdict and ordered a new trial. From that order this appeal is taken. The appeal says: "Said court erred in granting said motion of the defendants to set aside the verdict as

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against the evidence in said cause, because: (1) said court had no power or authority to set aside said verdict on said motion; (2) the record in said cause fails to disclose anything from which improper conduct on the part of the jury in fairly weighing the conflicting testimony and honestly and reasonably reaching their conclusion, can be legally inferred; (3) said verdict was not against the evidence in said cause; (4) said verdict was warranted by the evidence in said cause; (5) the said verdict is warranted, on the evidence, by the terms of the charge of the said court to the jury in said cause; (6) said verdict having been rendered three times by the jury after they had been returned to a second and a third consideration thereof by the court, the power of the court to set aside said verdict no longer existed."

The duty and the power of a trial judge in respect to any verdict which may be rendered by a jury in his court, has been recently gone over quite fully by this court in *Bissell* v. *Dickerson*, 64 Conn. 61. We have no occasion to change what was then said. Since that decision trial judges have repeatedly set aside verdicts for causes which have seemed to them to require such action, and as far as we are aware the exercise of that power has been generally acquiesced in. Ordinarily the power to set aside a verdict is called into action only by the motion of the party against whom the verdict was rendered. And there was, as the law formerly stood, an apparent inequality between the parties on the result of the motion. If the motion was denied, the parties making it could at once take the case, by a motion in the nature of an appeal, to the Supreme Court of Errors, but if the motion was granted, the party in whose favor the verdict was rendered and against whom the motion was granted, could not appeal. This inequality was corrected by the legislature, by the provisions of section 29, Chap. 194, of the Public Acts, 1897. That section enacts that "whenever any court shall set aside a verdict of a jury in a civil cause upon the ground that it is against the evidence in said cause, the party in whose favor said verdict was rendered may appeal

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from the decision setting aside said verdict to the Supreme Court of Errors, in the manner herein provided for appeals, and the court shall report all the evidence in said cause to the Supreme Court of Errors, and make it a part of the record, and if said Supreme Court of Errors shall be of opinion that such decision setting aside the verdict was erroneous, it shall reverse such decision and order judgment to be entered upon said verdict in the lower court in favor of the party for whom said verdict was rendered."

Motions to this court have been made many times, asking that a verdict of a jury be set aside on the ground that it is against the evidence. The rule which this court follows in such cases is pretty thoroughly established by repeated decisions. It is to the effect that the verdict will not be disturbed if there is any reasonable ground appearing in the evidence on which the jury might have acted. In the present case the rule to be followed is somewhat different from the one just cited. The statute which governs this case says that in a case where a verdict is set aside by a trial judge and an appeal is taken, the judge shall report all the evidence to the Supreme Court of Errors and if said court "shall be of opinion that such decision setting aside the verdict was erroneous," it shall re-establish the verdict, etc. In such appeal this court is dealing, not directly with the verdict of the jury, but with the action of the judge. The question, strictly, is not, was the verdict against the evidence; but did the judge err? It is possibly true that in determining the latter question we may be required to pass upon the former one. In doing so, however, we must give all reasonable presumptions in favor of the correctness of the judge's action. In *Chatfield* v. *Bunnell*, 69 Conn. 511, the plaintiff had recovered a verdict in the Superior Court, which the defendant moved that court to set aside on the ground that it was against the evidence. The Superior Court denied this motion. The defendant then filed a similar motion to obtain the same relief in the Supreme Court of Errors. This court was of opinion that the verdict should not be set aside for the reason stated, and in passing on that

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matter said: "Great weight is due to the action of the trial court, in denying the original motion filed immediately upon the conclusion of the trial, when the whole case was fresh in its recollection." The action of a trial judge is no less entitled to weight when he sets aside a verdict, than when he refuses to set it aside; and for the same reasons. He has seen the witnesses, heard their testimony, observed their demeanor on the witness stand, their manner and bearing, their intelligence, character and means of knowledge. And if while all this is fresh in his mind he sets aside a verdict, great weight would naturally be given to his action. In the case just above cited, when the trial judge had refused to set aside the verdict of a jury, we said: "It is only in a clear case that, under such circumstances, we should feel justified in coming to a different result." So, in this case, when the trial judge has set aside the verdict of a jury, we think great weight is due to his action, and that we should not be justified in coming to a different result unless there were reasonably strong grounds requiring us to do so.

"Where a new trial is granted, this court (the Supreme Court) will interfere only when the trial court misapplies or mistakes some principle of law, or manifestly abuses a discretion." *McCreary* v. *Hart*, 39 Kan. 216, 218; *Hicks* v. *Stone*, 13 Minn. 434, 437. "The rule adopted in this court (the Supreme Court), that the verdict of a jury will not be disturbed on the ground of insufficiency of the evidence, unless it appears, without substantial conflict, that there is no evidence to sustain the verdict, has no application to the court below. The judge of that court has the same opportunity to see the witnesses, to judge of their credibility, and of the degree of weight which ought to be given to their evidence, as the jury has, and is often better qualified to determine those questions than the jury itself. It has, therefore, been held by this court, in a long line of decisions, that where the evidence is conflicting, this court will not interfere with the exercise of the discretion of the court below in granting a new trial, unless there has been abuse." *White* v. *Merrill*, 82 Cal. 14, 17; *Smith* v. *First Nat. Bank*, 99 Mass.

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605; *Reeve* v. *Dennett*, 137 id. 315, 318; Butler, Nisi Prius, 327; *Bright v. Eynon*, 1 Burr. 390, 397.

Bartholomew v. *Clark*, 1 Conn. 472, was a case which had been tried to a jury in the Superior Court in Litchfield county, with a verdict for the plaintiff. The court returned the jury to a second and a third consideration, and, as they adhered to their first verdict, then accepted it. The defendant filed a motion in arrest of judgment which was overruled. The defendant then moved for a new trial because the verdict was against the evidence. This motion, with the questions of law arising thereon, the Superior Court reserved for the consideration and advice of the Supreme Court of Errors. The question was argued in the Supreme Court with great ability, by Nathaniel Smith and Roger Minot Sherman for the defendant, and David Daggett and Asa Bacon for the plaintiff. The Supreme Court advised that the verdict be set aside and a new trial granted. CHIEF JUSTICE SWIFT gave the opinion of the court, and in the course of it said: "I think a discreet and prudent exercise of this power (*i. e.* that of setting aside verdicts by a trial court) can be attended with no inconvenience or danger; that it is necessary to adopt it to complete the fabric of jurisprudence, and to give to courts all the powers essential to a due execution of the law. It should be exercised only in clear cases, which will rarely occur. It will leave to juries an important and valuable power in the trial of civil causes; and when it is understood that an erroneous verdict can be corrected, the public confidence in the trial by jury will be increased, instead of being impaired." *Bacon* v. *Parker*, 12 Conn. 212, 217.

The plaintiff did certain work in surveying and making a map of premises situate at Tariffville in the town of Simsbury. This suit was brought to recover for the service thus rendered. The plaintiff had a verdict against both the defendants, which the trial judge set aside. The plaintiff now appeals on the ground that this action of the trial judge was erroneous. If the evidence in the case was such that it did not support the verdict against both defendants, that is

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to say, if it was such that it was insufficient to support the verdict as against either one of the defendants, then it was rightly set aside and there is no error.

The evidence showed that the premises surveyed and of which the map was made by the plaintiff, did not belong to the defendants or either of them, and that the plaintiff knew this. He knew, also, that the surveying and map making was done, not for the benefit of the defendants or either of them, but for the benefit of some party for whom the defendants or one of them was counsel. The verdict, therefore, was not supported, unless there was evidence showing a joint contract by the defendants to pay the plaintiff for his services. The plaintiff says the defendants requested him to do this work, and although he supposed they were acting as the agents for some one else, as they did not tell him the name of their principal he had the right to regard them as his debtors. He says that one who contracts as an agent, if he does not disclose his principal, is himself liable, and cites Story on Agency, § 267. We have no occasion to question this authority. He says, also, that by usage an attorney is liable for the fees of sheriffs, clerks of courts, etc., in cases in which the attorneys are engaged, and that by parity of reasoning this rule extends to the fees of surveyors and civil engineers employed by attorneys. As a general proposition we think this latter claim could not be supported. But even if it were correct, there would be no error in this case, unless the evidence showed that the defendants had both of them, as such agents or attorneys, contracted with the plaintiff to render the services for which he has sued.

We do not find such evidence. The defendants were not partners. True, they were father and son, they were both lawyers, and they occupied the same office. These are circumstances which might give color or weight to evidence, but standing by themselves they prove nothing. All the evidence in the case is to the effect that they were not partners.

A construction of the evidence as favorable to the claim of the plaintiff as any that seems possible, might show that one part of the work done by him was done on the request

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of Mr. Charles E. Perkins, and all the rest on the request of Mr. Arthur Perkins. But the part ordered by Mr. Charles Perkins had been paid for before the suit was begun; so that as to him there was not even a *scintilla* of evidence to sustain the verdict. The joint verdict was therefore wrong, and properly set aside.

There is no error.

In this opinion the other judges concurred.

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JOHN R. HILLS ET AL., EXECUTORS, *vs.* THE TOWN OF FARMINGTON.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A builder who contracts in writing to erect a building in accordance with the architect's plans and specifications, is not liable for defects in the building which are due to structural faults in the architect's plans, unless made so by the terms of the written agreement; and in the absence of fraud or mistake, evidence that he orally guaranteed the correctness of the plans and the strength and stability of the building, is inadmissible to vary or enlarge his written obligations.

[Argued March 1st—decided March 24th, 1898.]

ACTION to recover a balance due upon a building contract for work and labor and materials furnished, brought to the Superior Court in Hartford County and tried to the court, *Prentice, J.*; facts found and judgment rendered for the plaintiffs, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

This action was brought to recover the balance due for the construction of a town-hall for the defendant. The hall was partially built by John C. Mead, and was completed by his representatives, the present plaintiffs. It was built in pursuance of a written contract between Mead and the de-

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fendant, containing the usual provisions of a building contract. The contract price was $10,500.

The complaint contained two counts: one for balance due on the contract price, and some extra work; and one for balance due on account stated; judgment was rendered on the former count. The answer alleges that Mead had not fulfilled his written contract, and that the building was not finished to the satisfaction of Sturgis & Keister, the architects, as required by the contract. It also contains a counterclaim, alleging that Mead had agreed with the defendant's building committee that if they would award him the contract to build in accordance with the plans and specifications of said architects, at the contract price of $10,500, he would warrant to said committee a properly constructed building; and that the committee had agreed to pay this extra price, being $2,000 more than the cost of construction, in consideration of the warranty. The plaintiffs replied to this counterclaim by a general denial.

The court found that the building was constructed in strict conformity with the plans and specifications, but that by reason of defects in its roof construction it is an improper and unfit building; that said defects were due to the faulty structural requirements contained in said plans and specifications, and to the construction of said building in accordance with said plans and specifications, and to no other cause.

Upon the trial the defendant offered evidence to prove the agreement alleged in its counterclaim, which was rejected. The rulings are stated in paragraphs 43 and 44 of the finding, as follows: "43. Upon the trial the defendant asked Gay, a witness in its behalf, whether the committee had authorized said architects to prepare any other plan for said building than said original plan with stone lower story. To this question the plaintiffs objected, upon the ground that it was immaterial whether such authority had been given by the committee, after such other plan had been made by the architects and embodied in the contract as the plan to be built upon. The objection was sustained and the question excluded. 44. Counsel for the defendant next asked said

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witness if the committee had ever employed said architects at all in the matter of the erection of said building. Plaintiffs' counsel objected. Defendant's counsel then said: 'I offer to show that these plans were prepared by Sturgis & Keister upon the request of a private individual, and handed over to this committee, and that this committee never employed these architects and never paid them; that this committee took these plans to Mr. Mead and submitted them to him, and that Mr. Mead, in order to induce this contract, after examining the plans, made such recommendation as he saw fit with regard to changes, one of which was this change from wood to stone—perhaps the only one—and that then, in order to induce this contract for the building and to induce the committee to pay him $10,500 therefor, which was $2,000 more than others would build the building for, Mr. Mead warranted to them that the building put up upon these plans would be all right and satisfactory, and that the plans were all right with that change. I offer to show that agreement as the inducement for this contract, not as disputing this contract, but as a separate and distinct agreement, entirely apart from this contract, and as the contract which induced this one.' After a somewhat extended discussion between counsel and the court as to the relevancy of these matters, during which it was conceded by counsel that all these matters took place before the execution of the contract, and rested wholly in parol, said question and testimony were, upon objection, excluded."

The appeal assigns error in excluding this testimony, and that the facts found do not support the judgment.

Noble E. Pierce, for the appellant (defendant).

Henry C. Robinson and *John T. Robinson*, for the appellees (plaintiffs).

HAMERSLEY, J. Testimony as to the employment by the defendant of the architects who prepared the plans which were adopted by the defendant and incorporated into the writ-

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ten contract made by it with the plaintiffs' intestate, was properly excluded as immaterial, unless it might come in as a part of the testimony supporting the verbal agreement alleged in the counterclaim. We think all this testimony was inadmissible. The parties had deliberately reduced their agreement to writing. There is no question of fraud or mistake. The defendant simply claims to add to the written contract a verbal warranty. It is well settled that a parol warranty cannot be superadded to a written contract of sale. *Dean* v. *Mason*, 4 Conn. 428, 431; *Gilpin* v. *Atwater*, 29 id. 93, 100.

In this respect the contract before us is not distinguishable from a contract of sale. The verbal agreement sought to be proved is an integral element of the negotiations which the parties, upon reaching a final conclusion, put into writing; and is not a separate agreement on a matter consistent with the terms of the written agreement. On the contrary, it contradicts that agreement. The verbal agreement, as alleged in the counterclaim and outlined in the offer of testimony, is that Mead agreed to build with a warranty for $10,500, being $2,000 more than the sum for which other contractors were ready to construct the building, and that the defendant "agreed to pay said extra price therefor, because of his (Mead's) said representations, and in consideration of his said warranty and guaranty." The written agreement details at length the obligations assumed by Mead for the consideration of $10,500, including the promise to finish said building agreeably to the drawings and specifications made by the architects (and annexed to the contract), to the satisfaction and under the direction of the architects, to be testified by a writing under their hands; the guaranty of skillful work and the use of proper materials; but not the warranty of the architect's plan. It also details the covenants on the part of the defendant to pay to Mead at the time and in manner specified the sum of $10,500, "in consideration of the covenants and agreements being strictly performed and kept by the party of the second part (Mead) as specified."

This contract appears to contain the obligations assumed

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by Mead in consideration of the receipt of $10,500, and the rights acquired by the defendant in consideration of the payment of that sum. It is presumed to contain the whole of that contract, and cannot be contradicted by parol testimony. *Averill* v. *Sawyer*, 62 Conn. 560, 568; *Caulfield* v. *Hermann*, 64 id. 325, 327. The probability of a town building-committee paying $2,000 to a contractor to warrant the architect's plans for an $8,500 building, is a matter pertinent to the weight of the evidence, but not to its admissibility.

The plaintiffs, by their denial of the counterclaim, put in issue the facts therein alleged; and there may be a question whether they were not estopped from objecting to testimony in support of that issue. This question would not control the ultimate rights of the parties; it was not raised in the court below, and is not specifically assigned in the appeal; and therefore we do not consider it.

Counsel for the defendant claimed in argument that the special facts found by the court, support a conclusion that Mead had by his conduct before and after the execution of the contract, made himself liable for the incapacity of the architects. There is no occasion to detail these facts; indeed the counsel urges them mainly in connection with the excluded evidence. It is quite clear that the committee had much too great confidence in Mr. Mead; but it is equally clear that he did not assume the liability claimed. The judgment of the court is the legal conclusion from the facts found.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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MILO K. WOODBURY, TRUSTEE, APPEAL FROM PROBATE.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

It is no part of the duty of a trustee in insolvency to appeal from the refusal of the Court of Probate to grant his application for an extension of the time within which alleged creditors of the insolvent might present their claims to commissioners; nor has the trustee such an interest, personal or representative, as entitles him, under the statute, to take such an appeal.

Such an appeal, if taken by the trustee, will be erased from the docket of the Superior Court upon motion of the appellee.

[Argued March 1st—decided March 24th, 1898.]

APPEAL from an order and decree of the Court of Probate for the district of Enfield denying the application of a trustee in insolvency for an extension of time within which creditors might present their claims against the insolvent estate, taken to the Superior Court in Hartford County and tried to the court, *Prentice, J.;* facts found and judgment rendered in favor of the trustee, and appeal by Margaret Raiche, a creditor, for alleged errors in the rulings of the court. *Error and cause remanded.*

Milo K. Woodbury, the present appellee, as trustee in insolvency of the estate of one Raiche, presented a petition to the Court of Probate in which said estate was then in process of settlement, alleging, in substance, that the time limited by said court for the presentation of claims to the commissioners upon said estate had expired; that through inadvertence and mistake a number of creditors, representing over one third of the total liabilities of said estate, had failed to present their claims within the time limited; that said claims were justly due from said estate; and asking that the time for presentation of claims be extended.

The court refused to extend the time, and from this order and decree of refusal the trustee took an appeal to the Superior Court.

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The motion for said appeal alleged no other interest in Woodbury than as trustee in insolvency of said estate. Margaret Raiche, a creditor of said estate, appeared in the Superior Court and filed a motion to erase the case from the docket, "upon the ground that it does not appear upon said appeal that the appellant has any interest in the decree appealed from; and also that the appellant, as trustee of said estate, has no right to appeal from said decree." The court denied the motion, and upon further hearing rendered judgment reversing the probate decree appealed from, reopening the hearing before the commissioners, and extending the time for presentation of claims for the period of one month from the date of judgment.

From this judgment Margaret Raiche appealed to this court, and assigns for error the action of the Superior Court, (1) in denying the motion to erase; (2) in overruling two certain specified claims made by her on the trial; (3) in fixing by its judgment the limits of the extension of time, instead of leaving this to be done by the Court of Probate.

Charles E. Perkins and *John Hamlin*, for Margaret Raiche (appellant in this court).

George B. Fowler, for the trustee (appellee in this court).

TORRANCE, J. The first question to be considered is whether the motion to erase should have been granted, and that depends upon the further question whether the trustee, as such, had the right to appeal from the probate decree in question here.

It is well settled that to entitle a party to appeal in a case like this, he must have some pecuniary interest which the decree or order appealed from will in some way injuriously affect. *Norton's Appeal*, 46 Conn. 527; *Dickerson's Appeal*, 55 id. 223. Furthermore, the record must show that he has such an interest, and if it does not, or shows that he has none, the case will, on a motion to that effect, be erased from the docket. *Norton's Appeal, supra; Campbell's Appeal*, 64 Conn. 277.

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The Superior Court in this case held, correctly enough, that the appellant must have a pecuniary interest in the subject-matter of the appeal. It also held that such interest may be "either in the appellant personally, or in another, with the duty in him, by virtue of his fiduciary relations or representative capacity, to protect it." This last, as a general statement of a general rule, is perhaps sufficiently accurate.

The trustee in insolvency is, unquestionably, for certain purposes and to a limited extent, the representative of both the debtor and the creditors. He takes the property upon a trust, first, to apply so much thereof as may be necessary to the payment of proven debts and attendant expenses, and secondly, to return whatever surplus may remain to the original owner. He also, like executors, administrators and receivers, and others who act in a representative capacity, is charged with the performance of certain duties in the interest of all concerned, such as protecting the property against unjust claims and demands, caring for and managing the estate in the interest of all to the extent of their proven rights, and seeing to it that its settlement is not unreasonably delayed nor made unreasonably expensive. *Williams* v. *Wadsworth*, 51 Conn. 277; *Greene* v. *Sprague Mfg. Co.*, 52 id. 330; *Merwin* v. *Austin*, 58 id. 22; *In re Wilcox & Howe Co.*, 70 Conn. 220.

Where the law imposes duties of this kind upon one acting in a representative capacity, it clothes him with power to perform them, and must, in such cases, hold that he has such an interest as entitles him to appeal under our statute relating to probate appeals. Thus, the right of an administrator or an executor to appeal from a probate decree, is recognized in *Lockwood* v. *Reynolds*, 16 Conn. 303; *Davis' Appeal*, 39 id. 395; *Hewitt's Appeal*, 58 id. 223; and it is common practice for executors, administrators and trustees in insolvency, to appeal from the doings of commissioners in allowing claims against the estate.

In this case the Superior Court held, in effect, that it was the duty of the trustee to see that no creditor "by accident

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or mischance, or otherwise inadvertently or unwittingly" lost his "status" as creditor, and if this did happen, to do what he could to restore him to that status. If this were so, it would perhaps follow that the trustee in this case would have the right to appeal; but we are of opinion that the trustee is not charged with any such duty.

To establish the amount and validity of his claim, and to maintain his right to present it to the commissioners, are plainly duties that belong solely to the creditor. His right to perform them is neither suspended nor in any way abridged by the proceedings in insolvency. In performing them he is acting simply and solely in his own interest, and in a measure adversely to the rest of the creditors; he is simply trying, in all that he does in this respect, to establish his standing as a creditor, and it should be done by him and at his expense, and not by other creditors or the debtor, and at their expense, through their representative, the trustee. If the creditor fails to establish his right to present his claim to the commissioners, or fails to establish the validity of his claim, or the amount of his debt as he claims it, he alone is the party aggrieved, and not the debtor, nor the other creditors, nor the trustee who for some purposes represents them.

The appellee in this court argues that if the trustee, under certain circumstances, as shown by some of the cases hereinbefore cited, can appeal from an order extending the time for presenting claims, there is no reason why he should not have the right to appeal from an order refusing to extend the time. The two cases are not analogous. In the former he is acting in the interest of the debtor and of all the creditors whose standing, as such, is undisputed, in a case where it is his duty to act in favor of a speedy and economical settlement; while in the latter he is charged with no duty to act, and is acting, if he acts at all, in favor of delay at the expense of the estate, in the interest of one or more parties whose standing as creditors is still in dispute.

A trustee may appeal from the allowance of a claim by the commissioners, but it does not follow from this that he can appeal from their action in disallowing a claim. In the one

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case he may be aggrieved in his representative capacity because it may be his duty, at the expense of the estate, to oppose the claim; in the other he is not charged with the duty of establishing the claim at the expense of the estate, and is not aggrieved in his representative capacity by its disallowance.

So far as we are aware the practice, in cases of this kind, has always been in accordance with the views herein expressed. The creditor himself has ample power to protect his rights, and we see no good reason why he should call upon the trustee to do this for him at the expense of others. For these reasons we are of opinion that the court below erred in denying the motion to erase.

In this view of the case it is unnecessary to consider or decide the other errors assigned.

There is error in the judgment complained of and it is set aside, and the cause remanded to the Superior Court to be proceeded with according to law.

In this opinion the other judges concurred.

STEPHEN ROPER *vs.* THE CITY OF NEW BRITAIN.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Under the provisions of the charter of the city of New Britain (10 Special Laws, pp. 133-136), the pendency of an appeal from an assessment of damages and benefits caused by the layout of a highway, taken by certain landowners, does not prevent another landowner who is not a party to such appeal and whose land has been actually taken and used for highway purposes, from suing the city and recovering the damages awarded to him.

The amount recoverable in such an action is the full sum awarded as damages, and not such sum less the amount assessed against the plaintiff as benefits.

[Argued March 2d—decided March 24th, 1898.]

ACTION to recover damages for a taking by the defendant of plaintiff's land for highway purposes, brought to the

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Superior Court in Hartford County and tried to the court, *Prentice, J.*, upon the defendant's demurrer to the plaintiff's reply; the court overruled the demurrer and subsequently rendered judgment (*Shumway, J.*) for the plaintiff, from which the defendant appealed for alleged errors in the rulings of the court. *No error.*

The original complaint was as follows: "1. On and before May 1st, 1895, the plaintiff was the owner in possession of a certain parcel of land situated in said town, within the limits of said city of New Britain (describing same). 2. On and before said 1st day of May, 1895, the defendant laid out a highway or public street across said land and appropriated for public use a portion of said land (describing portion appropriated). 3. On and before the 1st day of May, 1895, the defendant took and had such proceedings pursuant to its charter and the laws of this State, that it ascertained the amount of damages to the plaintiff on account of laying out said street and taking said land, to be $1,075, and the benefits therefrom to be $75, and the just compensation to the plaintiff to be $1,000. 4. On or about the 1st day of May, 1895, the defendant entered on said land against the remonstrance of the plaintiff, tore down the fences, cut down his fruit trees, destroyed his well, dug up the soil and constructed said street, and thereafter opened the same to public travel, and ever since has continued to use the same as a public street. 5. The defendant, though often requested and demanded, has never paid the plaintiff any part of said damages, so as aforesaid ascertained by said defendant, and has not made just compensation or any compensation to the plaintiff on account of the taking and damaging of his property for the purpose of said street, and neglects and refuses to make any appropriation or lay any tax for the purpose of providing for the payment of his damages or just compensation."

The complaint was afterwards amended by striking out paragraph 3, and inserting the following in place thereof: "3. The board of street commissioners of said city, after due notice and hearing as prescribed by its charter, pro-

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ceeded to assess all betterments and benefits, and to appraise all damages, for the laying out of said street or highway and taking said land and other lands covered by said layout, for public use, and prior to the 20th day of March, 1895, said board appraised the damages to the plaintiff on account of said layout and taking, at $1,075, and assessed benefits against him on account of said layout and taking, at $75, and no more. 3*a*. Prior to the 20th day of March, 1895, said board of street commissioners made their report of their doings to the common council of said city. 3*b*. On the 20th day of March, 1895, said common council accepted and adopted said report. 3*c*. The clerk of said common council recorded said report in the records of the common council, and said common council caused a notice signed by its clerk, containing the names of the persons thus assessed, with the amounts of their respective assessments, to be published twice in a newspaper published in said city of New Britain, to wit, on the 21st and 22d days of March, 1895."

One of the answers of the defendant, entitled "Second Defense," which admitted the truth of paragraphs, 1, 2, 3, 3*a*, 3*b* and 3*c* of the complaint, proceeded (after amendment), as follows: "4. Within ten days after the notice of the appraisal of damages and assessment of benefits had been given, as stated in paragraph 3*c* of the amendment of the complaint, Thomas C. Smith and others, not including the plaintiff, being the owners of land taken for the highway referred to in paragraph 2 of the original complaint, and claiming to be aggrieved by the estimate of the board of street commissioners of their damages caused by the layout of said highway, and by the assessment of benefits consequent thereon, applied by petition to David S. Calhoun, a judge of the Court of Common Pleas for Hartford County, for a re-assessment of their damages and a re-assessment of their benefits, in accordance with the provisions of the charter of the city of New Britain relating to appeals in such cases. 5. Said appeals by Thomas C. Smith and others were taken from the appraisal of damages and assessment of benefits to them, on account of the layout and construction of said highway, in

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accordance with the provisions of the charter of said city. 6. Said appellants in said appeal prayed that said judge of the Court of Common Pleas should reduce the assessment of special benefits, and should increase the appraisal of damages made to them, the said appellants. 7. (Stricken out by amendment.) 8. Said appeals are now pending. 9. By the provisions of said charter, if, upon the hearing of said appeals, said judge, or a committee appointed by him, shall find cause to alter the appraisal of damages or the assessment of benefits, or both, from which appraisal or assessment, or both, an appeal may have been taken, it will be the duty of said judge or committee to re-assess the whole amount of the damages or costs of construction of said highway, or both, upon the persons or land specially benefited, of whom the plaintiff is one. 10. By reason of said appeals, the amount to be paid by said city to this plaintiff, by reason of the lay-out and construction of said street and the taking of the plaintiff's land, is liable to be changed and altered, and the amount to be finally paid to him upon the determination of said appeals is now uncertain. 11. By reason of said appeals, the amount of compensation—*i. e.*, the excess of damages over benefits to be paid the defendant, if any—has not been ascertained, and the action taken by the city, as set out in paragraphs 2, 3, 3*a*, 3*b* and 3*c* of the complaint, was only a preliminary step towards such ascertainment, so that there is nothing yet due to the plaintiff by virtue of said proceedings."

To said "Second Defense" the plaintiff demurred, upon the ground set forth in such demurrer, as follows: "In lack of any allegation of an appeal on the part of the plaintiff, of the nature of those alleged in said answer to have been taken by Thomas C. Smith and others, or of any allegation of an appeal from the appraisal of damages to this plaintiff, there are no matters of fact alleged in said defenses, which, under the charter of the city of New Britain, or otherwise, by law operate to vary or suspend the right of the plaintiff to maintain this action, especially since the city, after said appeals were taken, has entered on said land, constructed a street

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thereon and opened the same as a public highway, and maintains the same as such." The court sustained said demurrer.

Upon the final hearing before the court the plaintiff claimed that upon the pleadings, judgment should be rendered in his favor for the full amount of damages appraised to him, to wit, $1,075, with interest from May 6th, 1895. The defendant claimed that if the plaintiff was entitled to judgment for damages, it should be for only $1,000, with interest from said date; namely, for the amount of damages, $1,075, appraised to the plaintiff, less the benefits, $75, assessed upon the plaintiff. The court sustained the plaintiff's claim and rendered judgment for $1,075 and interest.

Frank L. Hungerford, with whom was *William C. Hungerford*, for the appellant (defendant).

John Coats, for the appellee (plaintiff).

HALL, J. The city of New Britain, in accordance with the provisions of its charter, laid out a highway over the plaintiff's land. Damages and benefits were duly assessed by the board of street commissioners, and the notice containing the names of the persons assessed and the amount of their respective assessments, was published as required by § 50 of the charter, on the 21st and 22d of March, 1895.

Within ten days after said last date, Thomas C. Smith and others, as alleged in paragraph four of the defendant's second defense, appealed from the assessment of benefits and the appraisal of damages, so made to them, which appeal is still pending. The plaintiff's damages were appraised at $1,075, and he was assessed $75 as benefits. He has taken no appeal. In May, 1895, and while said appeal of Smith and others was pending, the defendant, without having paid to the plaintiff his damages, entered upon his land, constructed said highway and opened the same as a public street, and it has ever since been so used.

The present suit is not an action of trespass, and has not been so regarded by counsel for either plaintiff or defendant.

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The plaintiff claims that it is an action to recover the entire sum of $1,075 awarded him as damages; while the defendant claims that from the allegations of the complaint it should be held to be a suit to recover only the excess of the damages over the benefits.

There are but two contested questions presented: First, is the plaintiff barred from recovering judgment in this action by the pendency of the appeal of Smith and others. Second, if the plaintiff may recover, should the judgment be for the full sum awarded him as damages, with interest, or for said sum less the amount assessed as benefits, with interest.

The defendant maintains that the plaintiff cannot recover judgment until the amount due him from the city has been finally fixed, in the manner provided by the charter; and that so long as said appeal is pending that amount is uncertain, because by that appeal the sum awarded the plaintiff as damages may be either directly reduced, or diminished indirectly by an increase of the amount assessed to the plaintiff as benefits.

The sum of $75 assessed as benefits to the plaintiff, is not intended, under the defendant's charter, to measure the actual benefit derived by the plaintiff from the opening of the highway. It represents that part of the whole expense of the public work which he, as one specially benefited, is required to bear. The manner of making the assessment of such so-called benefits, is described in § 50 of the charter (10 Special Laws, 133, 134). The board of street commissioners having heard all parties interested, adds to the estimated cost of constructing and completing the highway, the amount of damage which will result to all persons whose land must be taken, and apportions the payment of the whole or a part of that sum, among those who will be specially benefited by such public work. It follows, therefore, that if it should be found upon the appeal of Smith and others, either that the benefits assessed by the board of street commissioners to either of the appellants are disproportionately large, or that the damages appraised to either of them are too small, it may become necessary to re-apportion the entire expense

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of the highway among those specially benefited, or, in the words of § 57 of the charter, "to re-assess the whole amount of the damages or cost of construction, or both, upon the persons or land specially benefited." Such re-assessment may increase the amount to be paid by the plaintiff to the city as benefits, and so may diminish the balance due the plaintiff from the city, if the benefits are to be deducted from the damages as appraised.

It does not occur to us that the interests of the plaintiff, or the relative obligations of the plaintiff and defendant to each other, can in any other respect be affected. Clearly, the question of the amount of the plaintiff's damages cannot be considered in the appeal of Smith and others. The plaintiff is not a party to that appeal, nor does the charter provide that he may become a party. Not until the appellate tribunal has found cause to alter the assessment or appraisal of some of the appellants, as made by the board of street commissioners, so that a re-apportionment of the expense, among those specially benefited is required, can the plaintiff and other persons interested be made parties to the proceeding, under § 58 of the charter. They are then made parties that they may be heard upon such re-apportionment of the expense, and for no other purpose.

The plaintiff's right to recover compensation for the land taken from him by the city, is not suspended during the pendency of this appeal, because a possible result of such appeal is an increase of the amount of benefits assessed to the plaintiff. The sum which the city must pay to the plaintiff, as damages for having taken his land, is in nowise dependent upon the amount which may be finally fixed as the just portion of the expense of the public improvement to be paid by the plaintiff. Adequate means are furnished the city to secure and collect such assessments of benefits, by §§ 53 and 54 of the charter. They are liens upon the land upon which they are made, taking precedence of all other liens or incumbrances, excepting taxes due the State, and may be foreclosed as mortgages. The assessments may also be collected by warrant in the same manner as town taxes. The amount

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of the appraisal of damages to the plaintiff was due and payable, notwithstanding the pendency of the appeal in question.

No appeal having been taken by the plaintiff, and no appeal having been taken by any person which could result in changing the appraisal of damages to the plaintiff, the common council after having accepted and adopted the report of the board of street commissioners and given the required public notice, should have ordered to be paid to the plaintiff the amount of his damage as assessed and determined, and upon his refusal or neglect to receive the same, the amount so due him should have been deposited in the city treasury to be paid to him when he should apply for it. The action of the common council in accepting and adopting the report of the street commissioners was not affected by the subsequent appeal of Smith and others. *Messer* v. *Wildman*, 53 Conn. 494. Under the circumstances of this case the city had no right to enter upon the plaintiff's land and appropriate it to the public use, against the will of the plaintiff, until his damages were either paid or deposited in the city treasury.

If facts might exist which would justify the city in delaying the payment of such assessments of damages, after having adopted the report of the board of street commissioners, they are not found in the present case. The plaintiff's land was entered upon and taken by the defendant for a public street, after the appeal of Smith and others was taken, and while that appeal was pending the defendant constructed the street over the plaintiff's land, and it has ever since been used as a public street. By so taking the plaintiff's property the city has accepted and affirmed the assessment of damages made to the plaintiff by the street commissioners, as final. As the city, under the provisions of its charter, could not take the plaintiff's land against his will and open the same as a public street, without having first paid to him or provided for the payment to him of the damages so assessed, it is estopped, after having so taken it and after having constructed and opened the public street, from averring that

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the damages as appraised to the plaintiff are not due and payable.

The plaintiff was entitled to recover the full amount of his damages as appraised, with interest, as allowed. The $75 assessed as the sum to be paid by the plaintiff as benefits, is subject to change by the re-assessment which may be rendered necessary by the appeal of Smith and others.

But were this not so, the claim of the plaintiff for damages, and that of the city for the assessment of benefits, are so far independent of each other, that the defendant, to have the benefit of its claim in this action, should have pleaded it, either as a set-off or as a counterclaim, unless such pleading was rendered unnecessary by the allegations of the complaint. Under the complaint as originally framed, such pleading would not have been required, as in paragraph three it was distinctly alleged that the just compensation to the plaintiff for the taking of his land had been ascertained to be $1,000. This averment was afterwards stricken out by amendment. The complaint in its present form is for the recovery of the full amount of the damages appraised. To have availed itself in this action of its claim against the plaintiff, the defendant should have pleaded it.

There is no error.

In this opinion the other judges concurred.

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JANE C. HEALY ET AL., EXECUTORS, *vs.* BERTRAND N. HEALY ET AL.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A testator gave the use of a portion of his property to *A*, and "at his decease to go to his legal heirs." *Held* that this bequest was not obnoxious to the common law rule against perpetuities, now prevailing in this State; and that *A* having predeceased the testator,

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the gift vested in those persons who were the legal heirs of *A* at the testator's death.

In the 7th clause the testator gave to his sister *W*, one twentieth of the remainder of his estate, "at her decease to go to her legal heirs." *Held* that *W* took a life estate only.

By the 9th clause the testator gave "to the legal heirs of my brother John's children," two twentieths of the remainder of his estate. *Held* that in order to conform to the testator's evident intent and avoid uncertainty, the words quoted should be construed as though they read, "to the legal heirs of my brother, John's children."

The gift in the 10th clause was to the "legal heirs" of my brother *M*. The will showed that *M* was living and that the testator knew it. *Held* that the expression "legal heirs" was used in the popular sense, as indicating those persons who, if *M* had died simultaneously with the testator, would have inherited his estate.

[Submitted on briefs March 2d—decided March 24th, 1898.]

SUIT to determine the validity and construction of the will of Samuel A. Healy of Canton, deceased, brought to the Superior Court in Hartford County and reserved by that court, *Shumway, J.*, upon a finding of facts, for the consideration and advice of this court.

Samuel L. Healy made his will on October 26th, 1896, and died January 1st, 1897. The will, which has been duly proved, is as follows: "1st. I give and bequeath to the two children of my nephew Bertrand (daughters), Edna and Sada, five hundred dollars each. 2d. I give and bequeath to the daughters of my deceased sister, Betsey Allen (name forgotten), or her legal heirs, one thousand dollars. 3d. I give and bequeath to my beloved wife, Jane Coe Healy, ten-twentieths of the remainder of my estate, real and personal. 4th. I give and bequeath to my brother, John Healy, the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to his legal heirs. 5th. I give and bequeath to my brother, Wm. C. Healy, the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to my brother John Healy's children, share and share alike. 6th. I give and bequeath to my brother, M. L. Healy, the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to his legal heirs. 7th. I give and bequeath to my sister, Julia Warner,

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one-twentieth of the remainder of my estate, real and personal, at her decease to go to her legal heirs. 8th. I give and bequeath to the legal heirs of my brother, Paul Healy (deceased), two-twentieths of remainder of my estate, real and personal. 9th. I give and bequeath to the legal heirs of my brother John's children two-twentieths of remainder of my estate, real and personal, share and share alike. 10th. I give and bequeath to the legal heirs of my brother, M. L. Healy, two-twentieths of remainder of my estate, real and personal, share and share alike. 11th. I ordain and appoint my wife, Jane Coe Healy, executrix, and my nephew, Anson W. Healy, executor of this my last will and testament, without bonds."

Upon settlement of the estate there remains to be distributed some $50,000 of personal estate, with real estate to the amount of $.

The complaint asks the Superior Court to construe the will in the following particulars: "First, whether, under section 4, the children of John Healy are entitled to one twentieth of remainder after his decease, or whether said remainder is intestate estate. Second, whether, under section 6, M. L. Healy's children are entitled to receive, or whether said estate, subject to said life use, is intestate. Third, whether, under section 7, Julia Warner takes absolutely, or her children take subject to her life estate; or if there will remain intestate estate. Fourth, whether, under section 8, Paul Healy's children or their representatives take, or said remainder is intestate estate. Fifth, whether, under section 9, the children or grandchildren of John take, or the estate given in the ninth clause is intestate. Sixth, whether, under the tenth clause, the children of M. L. Healy take, or the two-twentieths purporting to be given by said clause is intestate estate."

The court finds that the testator was eighty years old at the date of the will, which was written by one Rollin Humphey, who was at the time about seventy years old; and neither the testator nor Humphrey were lawyers. The court also finds that the defendant Bertrand N. Healy is one of

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the heirs at law of the testator, being the only son of Nathaniel Healy deceased, brother of the testator; that Thomas G. Healy, a brother of the testator not named as legatee, was a man of large wealth, and has died since the commencement of this action, leaving children surviving him; that the defendants Charles J. and Mabel Healy, Lucretia Barnes and Mary and Clara Beckwith, are the children and all the children of the testator's brother, John Healy, who died after the execution of the will and before the testator; that Herbert S. Beckwith is a son of Mary Beckwith, and Raymond and Louis Beckwith are sons of said Clara Beckwith (all being minors), and are all the grandchildren of John Healy deceased; that said John Healy lived a near neighbor to the intestate, who was intimate with John and his family and knew well his children and his grandchildren; that the defendants, Emma, Edith, Wallace and Willis Healy, Effa Curtis, Ellen Welton, Hattie Hyde, Winifred Hayes, Egbert N., Elmer and Henry Healy, were the children, and all the children of the testator's brother, M. L. Healy, and they were all well known to the testator at the time he executed said will; that the testator's brothers, Wm. C. and M. L. Healy, and his sister Julia Warner, still survive; that Paul Healy died before the testator, and three of his children and three representatives of children survive.

Charles H. Briscoe, for the executors, and for Julia Warner and the heirs of Paul Healy.

Donald T. Warner and *Howard F. Landon*, for Emma Healy et al.

Hungerford, *Hyde*, *Joslyn* and *Gilman*, for Bertrand N. Healy.

Samuel A. Herman, for Wm. C. and Marcus L. Healy.

Sperry, *McLean* and *Brainard*, for Charles J. Healy et al.

John H. White and *Sylvester Barbour*, for Mary Beckwith et al.

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HAMERSLEY, J. Some of the respondents in their answer allege certain facts as tending to show the circumstances under which the will was made, and the executors demurred to these allegations. Apparently this demurrer, although sustained by the court, is waived by the reservation; but if not, we deem it unnecessary to pass upon the action of the court in sustaining the demurrer, as the facts averred, in view of the plain meaning of the will, could only serve to support a construction sufficiently clear without them.

The clauses we are asked to construe are valid. A bequest of "the use of one-twentieth of the remainder of my estate to A. B., at his decease to go to his legal heirs," is certainly not obnoxious to the common law rule against perpetuities. It is immaterial whether it would be valid under our late statute of perpetuities. This will was executed since the repeal of that statute.

The gift in the fourth clause vests in the legal heirs of John Healy at the death of the testator. The prior death of the life tenant does not invalidate the gift over.

The seventh clause, which gives "to my sister, Julia Warner, one-twentieth of the remainder of my estate, real and personal, at her decease to go to her legal heirs,"—gives to Julia a life estate only. The language used, in connection with that of other parts of the will and its whole scheme, clearly expresses this intent.

The ninth clause gives the legacy named to the legal heirs of John. When a clause can be read so as to be consistent with a testator's evident intent and avoid uncertainty, it should be so read. By supplying the omission of a comma, any doubt as to the meaning of this clause disappears. It then reads: "I give and bequeath to the legal heirs of my brother, John's children, two-twentieths," etc.

In the tenth clause the legacy is given "to the legal heirs of my brother, M. L. Healy." It appears from the will itself that the testator knew that his brother was living, for he gives him a legacy in the sixth clause. It is therefore certain that he here uses the words "legal heirs" in the popular sense, as indicating the persons entitled to inherit if his

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brother were dead. Where the legal heirs include children and the representatives of children, as appears to be the case with those named in the eighth clause, of course they take *per stirpes*. *Jackson* v. *Alsop*, 67 Conn. 249, 254.

The Superior Court is advised:—

1. The legal heirs of John Healy living at the death of the testator, are entitled to the bequest under the fourth section.

2. The bequest under section six is to M. L. Healy for life, and upon his death to those who in that event are his legal heirs then living.

3. The bequest under section seven goes to Julia Warner for life, and upon her death to her legal heirs then living.

4. The bequest under section eight goes to the legal heirs of Paul Healy living at the testator's death.

5. The bequest under section nine goes to the legal heirs of John Healy living at the testator's death.

6. The bequest under section ten goes to those persons living at the testator's death who would be the legal heirs of M. L. Healy if he were dead.

7. All the above gifts are valid, and where the legal heirs consist of children and representatives of deceased children, they take *per stirpes*.

In this opinion the other judges concurred.

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In re Premier Cycle Manufacturing Company.

*First Judicial District, Hartford, March Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

Under the statutes of this State a receiver may be removed at any time, at the pleasure of the court; or, if the court is not actually in session, and the exigencies of the case require it, by any judge of the Superior Court, after due notice given.

Five days' notice to a receiver of a petition for his removal, is due notice.

Notice of such petition should be given to the plaintiffs and defendant in the receivership suit; but if they have actual notice, interpose no objection and take no appeal, the defect cannot avail the receiver upon his appeal from an order removing him.

Notice of such petition to every creditor who has proved his claim is not necessary.

In the present case the petition alleged that the receiver had neglected to pay certain bills which he had been ordered by the court to pay, but contained no other specific charges of negligence. The receiver answered, denying the negligence charged, and alleging that he had never done or omitted any act the doing or omission of which was prejudicial to the interests committed to his charge; that he had never disregarded any orders of court, but had sought its authority in advance of every important step. These allegations the petitioner denied. *Held* that upon these pleadings the door was open to a full investigation of all the doings of the receiver, and of whatever might affect his fitness to discharge the duties of his position.

A receiver has no vested right of office, and cannot appeal, either as receiver or in his personal capacity, from an order of removal by a tribunal having jurisdiction.

A judgment removing a receiver will not be reversed because a finding, prepared for the purpose of an appeal, and collateral to the judgment, contains certain expressions importing the personal liability of the receiver for debts contracted and losses incurred in the continuance of the business. Such conclusions of the trier form no part of the judgment of removal, and cannot be used against the receiver upon any subsequent accounting, or in any other suit.

The denial of an application of a receiver for authority to sell certain property of the estate at auction, rests in the sound discretion of the trial judge.

Conduct of a receiver prior to his appointment may be relevant to show

* Transferred from third judicial district.

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that his personal interests conflict with those of general creditors, and that he is for that reason not a fit person to continue as receiver.

It is only under exceptional circumstances that the principal manager of an insolvent company can with propriety be made its receiver; and such an appointment should never be made where his personal interests may conflict with those of creditors.

Counsel for the original receiver ought not to be permitted to act for his successor in office, in any inquiry in which the administration of the original receiver is attacked.

[Argued March 2d—decided March 24th, 1898.]

APPLICATION for the removal of the receiver of the Premier Cycle Manufacturing Company, made to the *Hon. George W. Wheeler*, a judge of the Superior Court, in vacation, in a case pending in that court for Fairfield County; facts found and judgment rendered in favor of the applicants, and appeal by the receiver in his representative and individual capacity, for alleged errors in the rulings of the court. *No error.*

The order of removal was as follows: "Ordered, that John C. Cassidy be forthwith removed from the position of receiver of the Premier Cycle Mfg. Co., and that he forthwith turn over to his successor in office everything which has come into his possession and hands as such receiver, including therein all books and papers and correspondence appertaining to such receivership.

"Ordered, that John C. Cassidy, heretofore receiver of the Premier Cycle Mfg. Co., forthwith prepare and file with the clerk of this court, a full and complete account of all his doings as receiver of said company, and that John C. Cassidy shall not be discharged of all or any of the liabilities resulting from or obligations incurred by said receivership, until said account shall be accepted and approved by the Superior Court or a judge thereof, and until the further order of said court or a judge thereof. *George W. Wheeler*, a judge of the Superior Court."

The appointment of the appellant had been made in 1896, upon a petition by himself and others, being more than one third of the stockholders of the company, alleging that it was financially embarrassed, but had assets more than sufficient, if properly administered, to pay all creditors, and asking that

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a receiver might be appointed to take charge of, manage and dispose of the same and wind up its affairs, for the benefit of all parties interested.

The order of appointment, made September 18th, 1896, authorized him to continue the manufacturing business of the company, subject to the orders of the court, employing necessary help and purchasing necessary materials. On July 6th, 1897, a further order was passed that the business be closed up by September 28th, 1897, and "that the receiver pay forthwith all bills for rent and labor now due, and all bills of such character to become due, immediately upon their becoming due."

On July 24th, the rent for the preceding month of the factory formerly occupied by the company, and, since his appointment, by the receiver, being unpaid, the landlord and sundry workmen employed by the receiver, whose wages were unpaid, brought a petition for his removal for violation of the order of July 6th and for negligence in the performance of his duties as receiver. The sums due these petitioners were due and payable prior to July 6th. The receiver made answer that he had not, as such, on July 6th or ever since, any funds wherewith to execute the order, and had conducted the business throughout, from the time of his appointment, without negligence, and with all due care and skill. The order of removal was passed after a full hearing as to all these matters.

A memorandum of the grounds of the decision was filed on August 3d, stating that the receiver's conduct, including among other things, his failure to pay the rent and wages due on July 6th, and his continuing the business since that date at a loss, had made him personally responsible for the loss to the estate. At his request a special finding of the facts upon which the order was passed was subsequently filed. This stated, among things, that he had no money in his hands, as receiver, on July 6th, 1897, and had received none since; and that he had continued the business since that date at a steady and increasing loss, in reliance on the success of a scheme of financial reorganization, which he had

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been working upon ever since his appointment, but which had, before July 6th, taken such shape as to be practically hopeless.

At the hearing he claimed that the only question to be considered was whether he had been chargeable with negligence or disobedience to the order of July 6th, in not paying the demands of those petitioning for his removal; which claim was overruled. He also claimed that the want of a longer time for the preparation of the case, and the want of notice to stockholders and creditors, prevented the receiver from adequately trying it, and in particular prevented him from presenting, as he believed he could, the formal protest of all the stockholders and of nearly all the creditors, against his removal.

The only notice ordered and formally given of the petition for removal was notice to him, as receiver, but the finding stated that all the parties of record in the action were either present at the hearing or had actual notice thereof, except three creditors; that these three, the judge believed, had actual notice; and that none had objected for want of notice. The order of notice was made July 24th and served on July 25th, the hearing being set for July 30th.

The receiver also claimed at the hearing, among other things, that no ruling could be made in this proceeding that he was personally liable for any obligations incurred by him as receiver; that want of funds was a sufficient reason for not paying the petitioners' demands; that one who contracts with a receiver officially cannot hold him personally liable; and that though acting as the representative of the court, if his removal and discharge is sought, he is nevertheless entitled to reasonable notice of such application; and if it is sought on the ground of his misconduct, he should not only have reasonable notice, but the grounds upon which his removal is sought should be specified and served upon him with such notice, in order that he may have an opportunity to be heard.

The finding contained this statement: "I considered, and so stated in the memorandum filed, that the facts proven

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established that the receiver ought to make good to the estate the loss incurred by his misconduct, but the only ruling made or order passed was that of removal. Thereafter I passed orders designed to protect the estate. Except as above stated, I did not overrule the claims made by the receiver's counsel, but regarded them in the main as inappli cable to the case before me."

John S. Seymour, for the appellant (the receiver).

The court erred in holding that the evidence could be applied for the purpose of securing the removal of the receiver on other grounds than the non-payment of rent or of labor bills. This was the specific charge in the petition, and to this charge the evidence should have been confined. *Dougherty* v. *Jones*, 37 Ga. 348; *Howard* v. *Lowell Machine Co.*, 75 id. 325; 20 Amer. & Eng. Ency. of Law, 218–220; *Burns* v. *Stewart Mfg. Co.*, 31 Hun, 195; *Campbell* v. *Spratt*, 5 Weekly Dig. 25. A receiver should not be removed or placed in contempt of court for non-compliance with an order which it is impossible for him to perform, unless his inability is caused by dishonesty or gross breach of trust. *Dempsey* v. *Deven*, 1 Brad. 490; *Weeks* v. *Smith*, 3 Abb. Pr. 211; *McCartin* v. *Syckel*, 10 Bosw. 694; *Clark* v. *Bininger*, 75 N. Y. 349. The removal of the receiver in the manner in which he was removed and for the supposed cause for which he was removed, was an abuse of judicial discretion of such a character that in itself it is thereby made an appealable question. *Meyer* v. *Cullen*, 54 N. Y. 397; *Tripp* v. *Cook*, 26 Wend. 152; 2 Ency. of Pl. & Pr. 415, 416, 417; *In re Livingston*, 34 N. Y. 582; *People* v. *Common Council*, 78 id. 56.

George P. Carroll, for the appellees (the applicants et al.).

A receiver is a *quasi* officer appointed by the court for the purpose of taking charge of, managing and disposing of property under the direction of the court; he is not appointed for any definite time or period; he acts under the direction of the court; he has no vested right to his office, and holds his appointment during the pleasure of the court

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only; the court may remove him at any time upon application, or of its own motion without application, whenever it deems that it is for the interest of the estate in its charge to do so; and such appointment and removal is within the discretionary power of the court, and will not be disturbed by the appellate court. Gen. Stats. § 1319; Pub. Acts, 1895, Chap. 108; *In re Colvin*, 3 Md. Ch. 302; *Connoly* v. *Kretz*, 78 N. Y. 620; *First Nat. Bank* v. *Barnum Wire, etc., Works*, 60 Mich. 487; Beach, Rec. 286, 781; High, Rec. (3d ed.) 114, 825; Gluck & Becker, Rec. § 114; 20 Amer. & Eng. Ency. of Law, 71, 107, 198, 225; *Ferry* v. *Central Bank of N. Y.*, 15 How. Pr. 446; *McCullough* v. *Merchants L. & T. Co.*, 29 N. J. Eq. 217; *Crawford* v. *Ross*, 39 Ga. 44; *Sings* v. *New York C. S. Co.*, 28 How. Pr. 481.

BALDWIN, J. A receiver, under our statutes, is subject to removal at any time, at the pleasure of the court. General Statutes, § 1319. When it is not actually in session, any judge of the Superior Court, should the exigencies of the case require it, may also remove him, after due notice given. Public Acts of 1895, p. 499, Chap. 108.

Due notice was given to the appellant of a petition for his removal. Five days was ample time for the preparation of his defense. It is assigned for error that the order did not direct notice to be given to the parties to the action. This should have been directed as to both the plaintiffs and the defendant; but as they in fact received actual notice before the hearing, interposed no objection for want of formal service, and have taken no appeal, the defect constitutes no ground of reversal, upon this proceeding. Notice to every one of the creditors who had proved their claims was not necessary.

The order of notice was for a hearing upon a certain petition, a copy of which was to be served on the receiver. That petition contained no specific averments of negligence or misconduct other than those as to his failure to pay the bills which he had been directed to pay by the order of July 6th. Without asking for any more particular specifica-

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tion of what it was intended to put in evidence, the receiver answered at length, denying the charge of negligence, setting forth the whole history of his management from the beginning, and affirming that he had "never intentionally done any act or omitted any act, the doing or omission of which was prejudicial to the interests committed to his charge; and that in particular he has never disregarded any of the orders of the court; that he has done no important act without seeking the authority of the court in advance." To this answer the reply was a general denial.

Upon this state of the pleadings, the trial judge was not confined to the question whether the order of July 6th had been disobeyed. The answer had opened the door to the investigation of all the doings of the receiver, from his original appointment to the time of the hearing, and of whatever might bear on his fitness to discharge the duties of his position.

The appellant therefore had due notice of the petition for his removal and of the grounds upon which an order of removal might be based. Jurisdiction to make the order having been thus acquired, the receiver could not, either as such or individually, appeal from it, on the claim that these grounds were insufficient. He had no vested right of office. If any interests were prejudiced by his removal, they were those of the parties to the action or intervening creditors, none of whom have taken any exception to it. *In re Colvin*, 3 Md. Ch. 278, 302. In many matters, a receiver may be treated as representing those entitled to the fruits of the action in which he is appointed, even for purposes of appeal from final orders in interlocutory proceedings. *Guarantee, etc., Co.* v. *Philadelphia, etc., R. Co.*, 69 Conn. 709. But it would be an inadmissible extension of this doctrine to allow him to except, in his representative capacity and at the expense of the estate, to his removal from office. *Conner* v. *Belden*, 8 Daly, 257.

The judgment appealed from does not set forth any finding of facts for its support. None was required. The Superior Court, of which the appellant was an officer, could remove

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him at pleasure. The authority of a judge of that court, acting when it is not in session, is the judicial authority of that court exercised at chambers. *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 602. On this proceeding, the judge was bound to give due notice, before taking action, to the parties interested; but when this was done, and they were fairly heard, he had the same power of removal at pleasure, in view of whatever this hearing might bring out, as if he had been holding court at a regular term.

A special finding of facts was afterwards made at the appellant's request, on which to predicate his appeal. In this paper, and in a memorandum of decision, to which it refers, there are expressions which he claims may be construed to import that he is personally liable for the bills referred to in the order of July 6th, and for any loss to the estate in consequence of his continuing the business of the company beyond the time when, in the opinion of the trial judge, it should have been closed up.

No adjudication on these points was made by the order of removal, and none of a final nature could be made in the finding of facts. A receiver may appeal in his individual capacity from an order which determines that after his discharge from office he will be personally liable for obligations which he contracted officially. *Hinckley* v. *Gilman, etc., R. Co.*, 94 U. S. 467; *Payne* v. *Dejean*, 32 La. Ann. 889. But even if the finding could be held to bear the meaning apprehended, the appellant could not be aggrieved by it. The evidential facts and conclusions which it set forth spent their force when the ultimate conclusion was reached by the trier, that there ought to be a change of receivers; and they could not be used against him upon any subsequent accounting, or in any other suit. *Kashman* v. *Parsons*, 70 Conn. 295.

These considerations are also decisive against the right of appeal claimed on the ground that the finding of facts states that he mismanaged the property in various particulars, and in this way may be damaging to his business reputation. He sought the finding, and if he has caused to be spread upon the record conclusions of the trier which would

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not otherwise have been disclosed, cannot make it a reason for reversing a judgment of which they formed no part, which they were not needed to support, and upon which no estoppel in respect to them could ever be predicated.

During the hearing on the petition for his removal, the receiver applied to the trial judge for an order authorizing him to sell certain property of the estate at auction, and from the proceeds to pay the debts which he had contracted in the management of the business. This was denied, and the denial is made a ground of appeal. It was a matter resting in the sound discretion of the trial judge, and nothing is shown to indicate that that discretion was abused.

There are numerous exceptions to the finding, and to the refusal to incorporate in it certain matters which the appellant claims to have been established by incontrovertible evidence, upon which we have no occasion to pass. For reasons already stated, the finding, even were it corrected as he desires, could not support the appeal.

One of these exceptions may merit a word further. It is that taken to the statement that shortly before his appointment, and when the company was hopelessly insolvent, the appellant, being the vice-president and manager, combined with his associates in office, they being with him liable as indorsers on company notes held by a bank, to give a preferential mortgage to secure the bank, and thus themselves; and that this transaction was not stated to the judge from whom his appointment proceeded. This, it is claimed, was irrelevant to the question whether the appellant had properly administered the affairs of the receivership. It was plainly relevant to the question whether he was a fit person to hold a position from which, if at all, that mortgage could be or could have been attacked in the interest of the general creditors; and therefore came within the proper field of inquiry. It is only under exceptional circumstances that the principal manager of an insolvent company can with propriety be made its receiver; and such an appointment should never be made where his personal interests may conflict with those of creditors.

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It may be added that, were there ground for any exception, it should have been taken, not to the statement of these facts in the finding, but (as by other reasons of appeal it virtually was) to the admission of the evidence in respect to them at the hearing, or to their use as a basis for the judgment of removal.

During the argument before this court objection was made, in behalf of the appellant, to the appearance against him here of counsel for his successor in the receivership who had been his own counsel while he was receiver. Had the objection come earlier, it would have been sustained; but it was not interposed until the second term, and after the same counsel had been heard at length upon a preliminary motion. The relation of counsel and client is one of so great confidence that, though the client may occupy such an official position as to represent the court, his successor in office, without his free consent, ought not to be permitted, even with the sanction of the court (which, we are informed, was here given), to avail himself of the services of the same counsel in any inquiry as to whether the previous administration was properly conducted. Particularly is this true where, as in this case, the counsel for the first receiver had before been counsel for him personally, and brought, as such, the action in which a receivership was sought.

There is no error.

In this opinion the other judges concurred.

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HENRY P. CLARKE'S APPEAL FROM PROBATE.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A writ of error from the Supreme Court of the United States may be addressed directly to the Superior Court, where the judgment sought to be reviewed was rendered by that court pursuant to the direction of this court given upon a reservation; and this is now the correct method of procedure in such cases.

[Submitted April 19th—decided April 20th, 1898.]

APPEAL from a judgment of the Superior Court in Fairfield County, affirming, pursuant to the advice of this court, an order and decree of the Court of Probate for the District of Bridgeport. *No error.*

Goodwin Stoddard, for the appellant.

John H. Perry, for the appellee.

PER CURIAM. It is stated by the counsel for the appellant that this appeal has been taken in order to lay a foundation for a writ of error from the Supreme Court of the United States.

It was unnecessary for that purpose. Such writs of error run to the highest court of the State in which a decision in the suit could be had. U. S. Rev. Stat. § 709. In the present case the Superior Court may properly be regarded as occupying that position. On the reservation upon which it previously came here (*Clarke's Appeal from Probate*, 70 Conn. 195), the Superior Court was advised to render the precise judgment which is the subject of this appeal. This advice was mandatory. No other decision could have been pronounced by the Superior Court than that which was pronounced. It was the last word of the judicial authority of this State. No right remained to review here a judgment which this court had on full consideration advised the Superior Court to render. It was therefore reviewable on a

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writ of error issuing directly to that court from the Supreme Court of the United States. *Gregory* v. *McVeigh*, 23 Wall. 294; *Foote* v. *Women's Board of Missions*, 162 U. S. 439.

It is true, however, that under circumstances quite similar, such writs have been addressed to the highest court in the State, and that this court has recognized the validity of that method of procedure. *Atherton* v. *Fowler*, 91 U. S. 143; *New Haven & Northampton Co.* v. *State*, 44 Conn. 376, 392. The latter decision was given at a time when the practice in this respect, upon writs of error from the Supreme Court of the United States to State courts, could not be considered as fully settled. We shall on this occasion follow the precedent thus established, but have thought it proper to explain our views at length as to the correct practice, so that appeals of this character may not hereafter be unnecessarily brought.

There is no error.

THE STATE *vs.* JOHN E. HARBOURNE.

First Judicial District, Hartford, March Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Chapter 68 of the Public Acts of 1893, which prohibits all persons from engaging in the business of transmitting money to any race track or other place to be there bet upon any horse-race, game, sport, etc., whether within or without this State, and also the keeping of any place in which such business is permitted or carried on, is not in violation of the Federal Constitution as a regulation of interstate commerce.

Although a single transfer of money by a telegraph company for betting purposes, does not constitute a carrying on of the prohibited business, yet such act would be relevant and, in connection with other evidence, might be sufficient to prove a violation of the statute.

It is not essential to a violation of the statute by a telegraph company, that its business should relate exclusively to the transmission of money for betting purposes; it is enough if it engages in that business, although its other business may be legitimate telegraphing.

[Submitted on briefs March 3d—decided May 3d, 1898.]

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State v. Harbourne.

INFORMATION for keeping a place in which the business of transmitting money for betting purposes was permitted and carried on, and for being unlawfully concerned in such business, brought to the City Court of Waterbury and thence, by defendant's appeal, to the District Court of Waterbury and tried to the jury before *Cowell, J.*; verdict and judgment of guilty, and appeal by the accused for alleged errors in the charge of the court. *No error.*

The case is sufficiently stated in the opinion.

Charles E. Perkins and *Michael J. Keneally*, for the appellant (the accused).

The business of sending messages and money by telegraph from one State to another, is interstate commerce. Prentice, Pol. Pow. p. 280; *Telegraph Co.* v. *Pendleton*, 122 U. S. 347. It may be that this State could prohibit citizens of this State from betting upon horse-races in other States, or from sending money to be so bet there; but even if that be so, it would be very different from a law prohibiting a telegraph company from sending such messages or money. The distinction is clearly marked. *Leisy* v. *Hardin*, 135 U. S. 100; *Tel. Co.* v. *Tel. Co.*, 96 id. 1; *Tel. Co.* v. *Texas*, 105 id. 460; *Ratterman* v. *Tel. Co.*, 127 id. 411; *Tel. Co.* v. *Pendleton, supra; In re Penn. Telephone Co.*, 48 N. J. Eq. 61, *Dinsmore* v. *New York*, 12 Abb. N. C. 439; *Adams Ex. Co.* v. *Same*, 12 How. Pr. 72; *Western Union* v. *James*, 162 U. S. 650; *Leloup* v. *Mobile*, 127 id. 640.

Nathaniel R. Bronson, Prosecuting Attorney, for the appellee (the State).

The Act in question is not a regulation of interstate commerce, but a legitimate exercise of the police power of the State. Cooley, Const. Lim. pp. 704, *et seq.*, 722, 723 and *n.* 2, 741, 742, 595 and *n.* 4; Prentice, Pol. Pow. pp. 103 and *n.* 1, 106 and *n.* 2, 429, 12 and *n.* 3, 13 and *n.* 5, 18; *Railroad Co.* v. *Husen*, 95 U. S. 467; quoted approvingly in *Plumley* v. *Massachusetts*, 155 id. 478. See also *Sherlock* v. *Alling*, 93 id. 104; *Telegraph Co.* v. *Texas*, 105 id. 460; *Smith* v. *Ala-*

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bama, 124 id. 465; *Nashville, etc., Co.* v. *Alabama*, 128 id. 96; *Bowman* v. *Chicago, etc., Co.*, 125 id. 465; *Morgan* v. *Louisiana*, 118 id. 464; *Beer Co.* v. *Massachusetts*, 97 id. 25; *Mugler* v. *Kansas*, 123 id. 623; *Geer* v. *Connecticut*, 161 id. 534; *Patterson* v. *Kentucky*, 97 id. 508; *Phalen* v. *Virginia*, 49 id. 167; *Stone* v. *Miss.*, 101 id. 814; *Brien* v. *Williamson*, 8 Miss. 14; *Mobile* v. *Kendall*, 102 U. S. 698; *Escanaba Co.* v. *Chicago*, 107 id. 687; *Phila. S. S. Co.* v. *Pennsylvania*, 122 id. 326; *Robbins* v. *Shelby Taxing District*, 120 id. 489; *New York* v. *Miln*, 11 Pet. 102. If the telegraph company were doing a legitimate business, no doubt State legislative restraints and prohibitions would be contrary to the constitutional provision. We admit that this would be "commerce." *Telegraph Co.* v. *Texas*, *supra*; *Ratterman* v. *W. U. T. Co.*, 127 U. S. 411; *Pensacola Tel. Co.* v. *W. U. T. Co.*, 96 id. 1. Whether the betting is completed in this State or outside of it, makes no difference. It is the betting that is sought out by the statute.

HALL, J. The Act creating the offenses charged, is directed against that form of gambling known as pool selling, including bets or wagers on the result of any trial of speed, skill or endurance (Public Acts of 1893, p. 240). It prohibits: 1. Keeping any place with apparatus or devices for the purpose of carrying on such gambling. 2. Keeping any place where pool selling of any kind, either directly or indirectly is permitted or carried on. 3. Keeping any place in which the business of transmitting money to any race track or other place there to be placed or bet on any horse-race, etc., whether within or without this State, is permitted or carried on. 4. Making any such wager or buying or selling any such pools. 5. Being concerned in buying or selling any such pools. 6. Being concerned in carrying on the business of the transmission of money to any race track, etc.

The defendant is charged in the first count with a violation of the third prohibition, and in the second count with a violation of the sixth. The defense relies on the alleged unconstitutionality of the Act.

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On the trial of the case to the jury, upon the plea of not guilty, "the State claimed and offered evidence to prove, that on the 28th day of January, 1897, the defendant, in the city of Waterbury, was employed by the New Jersey News and Electric Telegraph Company, as the manager of its telegraph office there located; that as such manager he received from one a telegraphic message in the ordinary form used for transmitting messages, addressed to the Jersey City Commission Company, Jersey City, New Jersey, directing the said Jersey City Commission Company there to bet for the sender of said message the sum of money named therein, and to draw upon Mills & Company, New York City, N. Y., for said money; that at the time of delivery of said message to the defendant the said deposited with the defendant said sum of money to be by him transmitted by telegraph to Mills & Company, New York City, subject to the draft of the said Jersey City Commission Company, and that said telegraph message was by the defendant transmitted by telegraph to the Jersey City Commission Company, and said money was by the defendant transmitted by telegraph to Mills & Company, and that the defendant knew that the purpose in said transmissions was to have said money bet upon a horse-race without this State. The State offered evidence of no other violation of the law.

"The defendant claimed and offered evidence to prove and claimed he had proven, that in the receipt of said message and of said money he was acting as the agent of his said employer in the ordinary course of business of a telegraph company engaged in the business of telegrapher of messages and moneys. The defendant admitted that he knew the purpose for which said money was sent and said message transmitted."

The defendant in writing requested the court to charge the jury as follows: "1. That if the jury shall find that the accused, as charged in the first count of the complaint of the prosecuting attorney, did possess, keep, manage, maintain, and occupy a certain room, office, and place in which the business of transmitting money to a certain race track or

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race tracks, or other places without this State, there to be placed or bet on certain horse-races, games, and competitions, with full knowledge thereof, and that said keeping, possessing, managing, maintaining, and occupying was in the ordinary course of the business of a telegraph company, he is guilty of no offense against the laws of this State, as any statute of this State prohibiting such acts would be and is in violation of and against the provisions of the Constitution of the United States, vesting in the Congress of the United States the power of regulating commerce between the States. 2. That if the jury shall find that the accused did in fact, as charged in the second count of said complaint, transmit (by telegraph) money from the city of Waterbury to a place without this State for the purposes alleged in this complaint, and that said transmission was in the ordinary course of the business of a telegraph company, he is not guilty of any offense against the laws of the State, and that a statute of this State which prohibits such act is void, being contrary to said provision of the Constitution of the United States."

The court refused to so charge the jury, but did charge the jury as follows: "That notwithstanding the jury should find that in the keeping, etc., of the place as set forth in the complaint, the accused kept said place for the ordinary purposes of a telegraphic business, yet if the business of transmitting money for the purposes charged in the complaint was carried on in said place, the accused was guilty of a violation of the laws of this State, and the statute prohibiting such act was constitutional; and that if the jury should find that accused did, as charged in the second count of said complaint, knowingly transmit (by telegraph) moneys from the city of Waterbury to a place without this State to be bet upon a horse-race, that the accused is guilty of a violation of the laws of this State, notwithstanding such transmission may have been in the ordinary course of the business of a telegraph company, and that the statute of this State prohibitive of such act is constitutional."

To the court's refusal to charge as requested, and to the charge as delivered, the defendant duly excepted.

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The case was submitted in this court on briefs. In that of the State, it is stated that "the facts are not disputed, nor is it denied that the statute concerning pool selling distinctly prohibits the act done by the accused. He claimed, however, that the law was unconstitutional. No other line of defense was adopted, and no evidence put in to confuse the issue." The brief filed by the defendant in reply, commences thus: "It appears from the brief of counsel for the State that the only question in this case is that of the constitutionality of the Act of 1893, p. 240 of the Public Acts of that year. He also admits that the Act would be invalid as a restraint on interstate commerce, if it cannot be brought within the limits of the police power of the State. This limits the question to the precise point as to whether, under any claim of police power, the State can interfere with messages sent from one State to another, because the legislature thinks that the matters concerning which the messages are sent are such as it does not approve of."

We shall dispose of the appeal on the question to which the counsel on both sides have thus addressed themselves, and which they seem to agree in regarding as the only one presented on the record; assuming that the attention of the jury was properly directed by evidence and instructions, to which it was thought unnecessary to refer in the finding, to the necessity of proof, under the second count, that the defendant, at the time of transmitting the money to be bet, was unlawfully concerned in the carrying on of the business of the transmission of money to places without the State, there to be placed or bet.

The decisions in respect to the power of Congress to regulate commerce among the several States, which is granted by the Constitution, have been numerous and not altogether consistent; but they seem to have established the following propositions: A State law dealing directly and only with interstate commerce, is void; a State law purporting to deal with domestic matters, but being in its effect and essence merely a regulation of interstate commerce, is void; a State law plainly and in good faith dealing only with State mat-

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ters, is valid, notwithstanding it may incidentally affect interstate commerce, unless it comes in conflict with some valid statute of the United States on that subject, or, in the absence of legislation, affects such commerce in a particular where the silence of Congress is equivalent to legislative prohibition.

The power of regulating commerce covers such a wide field, that cases must arise where a law passed in the legitimate exercise of the power of domestic legislation, is also, in a sense, a regulation of commerce; but it is not therefore necessarily an invasion of the jurisdiction of Congress, *i. e.*, an exercise of the "power" of regulation; it is an exercise of the "power" of domestic legislation, and is valid unless it conflict with some existing law, or so essentially affects interstate commerce as substantially to disturb those channels of commerce which Congress has seen fit to leave undisturbed. In dealing with such legislation the courts have given a much wider latitude to what is called police legislation, than to other forms of domestic legislation; because police regulations are absolutely essential to the protection of society, and in the main can only be established by the State government.

The law in question is purely a police regulation. For more than two hundred years we have treated wagering as against public policy, and playing at the games which promote wagering has been illegal. The restrictions on playing the games have been removed, but playing for anything of value is still an offense. General Statutes, §§ 2557, 2558. A wager of any kind is illegal; the loser can recover the money lost, and if he does not sue, any person may sue for and recover treble the amount. General Statutes, §§ 2552, 2553 (passed in 1797, Statutes of 1808, p. 361). Betting on horse-races is a penal offense. General Statutes, § 2556. Since the establishment of our government wagering has been held to be, if not absolutely immoral, yet so injurious in its results as to require suppression by penal legislation. Such legislation has for many years past been directed against the business of promoting wagering in its various

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forms; and the keeping of places where such business is carried on has been treated as an offense. Indeed, throughout the United States the business of gambling is now recognized as illegitimate, and one whose contracts the courts will, in many cases, refuse to enforce. Within the past two years the United States Supreme Court has said: "This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries." *Douglas* v. *Kentucky*, 168 U. S. 488, 496. Similar language may appropriately be used in respect to the pool selling against which the Act in question is directed; especially since the perversion of the telegraph to its uses has multiplied many fold its capacity for harm.

The Act of 1893 attempts to reach the root of the evil, by prohibiting the keeping of a place in which this kind of gambling in any of its ramifications is carried on. One of the most dangerous forms is that for which the telegraph is utilized. In prohibiting the keeping of a place in which such a business is carried on, or being concerned in such a business, the State does not attempt to and does not in fact exercise any exclusive power vested in Congress over interstate commerce; it simply prohibits in this State the business of aiding crime, and if such commerce is thereby affected at all, it is the incidental effect of depriving those here engaged in telegraphing, of the profits they might make through the business of promoting gambling in this State. That business is prohibited; and it is immaterial whether it be carried on by an individual in his own house, or by a telegraph company apart from, or as a part of, its ordinary business of telegraphing. In whatever place and by whomsoever the business of promoting gambling is carried on, the offense is committed; and cannot be justified because in committing it a telegram is sent from Connecticut to New Jersey. In *Plumley* v. *Mass.*, 155 U. S. 461, it was claimed that the power of regulating interstate commerce involved the right in all citizens to introduce and sell in any State any harmless article of food, unrestricted by State legisla-

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tion; but it was held that a police regulation forbidding the sale in such manner as was likely to induce the citizens of Massachusetts to buy one article under the belief they were buying another, was not a restriction of interstate commerce. The court said (p. 479): "The Constitution of the United States does not secure to any one the privilege of defrauding the public." No more does it secure to any one the privilege of promoting gambling. The same principle, *i. e.*, that a police regulation pure and simple does not become a regulation of interstate commerce, merely because it may incidentally affect the bringing into the State or sending out, of certain articles of commerce, was affirmed in *Geer* v. *Connecticut*, 161 U. S. 519, 534. But when a State attempts to regulate domestic commerce in an article which it recognizes as a legitimate subject of commerce, so as to discriminate in favor of domestic commerce, and against interstate commerce in that article, the law ceases to be a pure police regulation and becomes a direct interference with interstate commerce. *Scott* v. *Donald*, 165 U. S. 58. The law before us is not analogous to the South Carolina Dispensary Law, condemned in *Scott* v. *Donald*. There might be some analogy if the legislature had recognized gambling by telegraph as a legitimate subject of commerce, and had undertaken to authorize the business of transmitting money for the purpose of gambling when the transmission was to places within the State, and to forbid or to regulate it when the transmission was to places without the State. The law comes within the principle illustrated by the cases of *Plumley* v. *Mass.* and *Geer* v. *Conn.*, *supra*, *Mo. Kan., etc., Ry. Co.* v. *Haber*, 169 U. S. 613, as well as by many other cases unnecessary to cite. It is closely analogous, so far as the principle involved is concerned, to the Georgia law forbidding the running of railway trains on Sunday, which was sustained, although the channels of interstate commerce were thereby blocked for one day out of every seven. The language of the court in announcing the decision is applicable to the present case, and would seem to be conclusive. After reviewing various prior decisions, the court, speaking by MR. JUSTICE HARLAN,

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says: "These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." *Hennington* v. *Georgia*, 163 U. S. 299, 317.

In the case at bar the defendant's sole claim was, that if he kept the place as charged and was concerned in the business as charged, yet inasmuch as some of the acts essential to constitute these offenses consisted in the transmission of the information and money to another State, he was guilty of no offense, because a law restricting the ordinary business of telegraphing among the States is void; and his sole grievance is that the court did not so charge. For the reasons given we think the charge on that point was correct. When one opens an office and makes arrangements and furnishes facilities to enable his customers to sit in his office and gam-

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ble upon the results of horse-races in this State and other States, he keeps a place in which the business forbidden by the statute is carried on; and if he knowingly assists in the transmission of money in the course of that business, he is concerned in the business. It is immaterial whether the illegal business is carried on as an wholly independent business, or as a part of an otherwise legitimate business in telegraphing.

For a telegraph company to transmit a single message, and make a single transfer of funds, such as is stated in the finding of the court in the case before us, would not, standing alone, constitute a carrying on of the business of transmitting money for betting purposes. It would, however, be relevant evidence to show that fact, and might be sufficient, in connection with proof that the company furnished special conveniences for the use of those desiring to make such bets, or had no substantial business of any other description.

There is no error in the judgment of the District Court.

In this opinion the other judges concurred.

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In re the E. S. Greeley and Company Receivership.

Third Judicial District, Bridgeport, April Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

A non-resident creditor of an insolvent corporation in the hands of a receiver in this State, having a claim for $700, sued the corporation in his own State and factorized a debt due to it there amounting to $1,000 or more; subsequently he presented his claim to the receiver in this State but refused to release his attachment. At the date of this attachment the garnishee was, apparently, able and willing to pay its debt to the receiver, but since that time had itself gone into the hands of a receiver, and it did not now appear how much, if anything, could be recovered from the garnishee. *Held* that the refusal of the creditor to release his attachment deprived his claim of all equity, and justified the receiver in disallowing it.

The rule applicable to secured creditors in the distribution of the prop-

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erty of an insolvent debtor whose estate is in settlement in the Court of Probate (General Statutes, § 590), applies also to secured creditors of an insolvent corporation in the hands of a receiver.

[Argued April 20th—decided May 3d, 1898.]

APPEAL from a judgment of the Superior Court in New Haven County, *Prentice, J.*, in a receivership suit, disallowing the claim of the Standard Underground Cable Company, an alleged creditor of the defendant company. *No error.*

The finding of facts, agreed to by the parties, is as follows: "1. On the 6th day of October, 1896, Edwin S. Greeley was appointed by this court receiver of the E. S. Greeley & Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and located in New Haven in the State of Connecticut. 2. The Standard Underground Cable Company is a corporation organized under and by virtue of the laws of the State of Pennsylvania, is located at Pittsburg in said State of Pennsylvania, and is a creditor of the E. S. Greeley & Company to the amount of $710.35. Said claim has been duly presented to said receiver. 3. On March 1st, 1897, the said Cable Company brought suit in the State of Pennsylvania against the said Greeley & Company, and garnisheed a debt of more than $1,000 then owing said Greeley & Company from the Electrical Supply & Construction Company, a corporation located in said State of Pennsylvania. 4. No receiver of the said Greeley & Company has ever been appointed in the State of Pennsylvania, and no receiver appointed in any other State has ever collected the debt due the Greeley & Company from the Electrical Supply & Construction Company. 5. Suits in Pennsylvania were brought by said receiver, however, not in his own name, but in the name of the E. S. Greeley & Company, against the said Electrical Supply & Construction Company, and in such suits judgments have been recovered against said Electrical Supply & Construction Company. Said judgments were recovered on February 10th, 1897. 6. Upwards of $1,000 has been paid to the Greeley & Company, or its assigns, upon said judgments, leaving a balance

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of more than $1,000 of said judgments which was attached in said garnishee case, as stated above. 7. The claimant, the Cable Company, refused and still refuses to release its attachment. 8. In the suit of the Cable Company v. E. S. Greeley & Co., judgment has been rendered, but nothing has ever been recovered from or paid by the said Supply & Construction Company, or by any other person thereupon, and the whole amount of the claim, $710.35, is now due said Cable Company from the E. S. Greeley & Company. 9. Since the rendition of the judgment in the garnishee case, the Supply & Construction Company has itself gone into the hands of a receiver, and is insolvent, and it is uncertain how much, if anything, can ever be obtained from said garnishee upon the attachment of the debt due the Greeley & Company, as aforesaid."

The Superior Court disallowed the claim and the Cable Company appealed to this court.

Seymour C. Loomis, for the appellant (claimant).

There is no distinction between resident and non-resident creditors, in their right to prove their claims against the estate. U. S. Const. Art. IV, § 2; *Paine* v. *Lester*, 44 Conn. 196. The mere fact that the Cable Co. had an unsatisfied judgment, secured by an attachment in Pennsylvania, does not operate in any way to defeat this right. *National Bank* v. *Haug*, 82 Mich. 607, 613; *Kellock's Case*, L. R. 3 Ch. App. 769; *Moses* v. *Ranlet*, 2 N. H. 488; *In re Bates*, 118 Ill. 528; *Kellogg* v. *Miller*, 22 Ore. 406; *Findlay* v. *Hosmer*, 2 Conn. 350; *People* v. *Remington*, 121 N. Y. 328; *In re Brough's Estate*, 71 Pa. St. 461; *Tod* v. *Kentucky Union Land Co.*, 57 Fed. Rep. 64; *Allen* v. *Danielson*, 15 R. I. 481. The debt which the Cable Co. garnisheed was not in the possession of the receiver, not *in custodia legis*, and hence was open to attachment by diligent creditors. *Paine* v. *Lester*, *supra*, 204. The judgment debt which was attached in Pennsylvania did not belong to the Connecticut assets. *Harrison* v. *Sterry*, 5 Cranch, 289, 302; *Crapo* v. *Kelly*, 16 Wall. 610; *Upton* v. *Hubbard*, 28 Conn. 274; *Eybert* v. *Baker*, 58 id.

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324. The Cable Co. had a perfect right to make this attachment in Pennsylvania. It was a citizen of that State. *Reynolds* v. *Adden*, 136 U. S. 348; *Moran* v. *Sturges*, 154 id. 272; *Warner* v. *Jaffray*, 96 N. Y. 248; *Hibernia Bank* v *Lacombe*, 21 Hun, 166. Section 590 of the General Statutes does not apply to this case. In the *Waddell-Entz Co.*, 67 Conn. 324, the creditor had actually realized upon his security; in this case nothing has been realized by the creditor. If, however, the rule given in the statute is to apply, then the value of our security is to be appraised and that value deducted from the debt and the balance allowed. *Neufelder* v. *Ins. Co.*, 10 Wash. 393; *Fay* v. *Jenks*, 78 Mich. 304.

Henry G. Newton, for the appellee (receiver).

If a citizen of Connecticut had undertaken to attach this debt, as the claimant did, he could and would have been restrained by injunction. *Cunningham* v. *Butler*, 142 Mass. 47, *Cole* v. *Cunningham*, 133 U. S. 107; *Reynolds* v. *Adden*, 136 id. 348. Can a non-resident gain an advantage because he is not subject to an injunction by our courts? *Long* v. *Forrest*, 150 Pa. St. 413, 23 L. R. A. 33 and note; Gluck & Becker, Rec. p. 222, *et seq.* The decision in the *Waddell-Entz Co.*, 67 Conn. 324, settles the question at issue. The value of the security must be taken as of the time when the claimant seized upon the debt and prevented its collection. In the absence of proof as to the value of security, the doubt is to be taken against the claimant. *National Bank* v. *Davis*, 64 Minn. 250.

ANDREWS, C. J. In the case of the *Waddell-Entz Co. Receivership*, 67 Conn. 324, 337, this court said: "The insolvent act of 1853 contained a provision (now found in § 590 of the General Statutes) requiring a secured creditor who presented his claim against the estate, to elect between the surrender of such security, and a dividend from such estate only upon the excess of such claim above the value of such security. In *Mechanics' and Farmers' Bank, Appeal from Probate*, 31 Conn. 63, 70, it was held that this statute placed

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all the property of the insolvent in the custody of the law to be disposed of according to law; that the creditor has no vested interest in such property; and that the statute was 'strictly remedial, providing for the appropriation of the debtor's property, on principles of equity and justice among all his creditors.' The provision in relation to secured creditors was extended to insolvent estates of deceased persons; so that the equitable rule applied to the distribution by law of all insolvent estate, including insolvent corporations. In 1869 a law was passed for the winding up of corporations, and under that law the property of the insolvent corporation could be taken possession of for division among all creditors in equal proportions, by a receiver appointed by the Superior Court as a court of equity, as well as by a trustee appointed by the Court of Probate under the insolvent Act. *New Haven Wire Co. Cases*, 57 Conn. 352, 387. The present proceeding is brought under this Act, which is still in force substantially unchanged. General Statutes, § 1942. The Act confers on the court full equity powers to make such orders as to the doings of the receiver 'and as to the payment of debts and distribution of the effects of said corporation, as may be just and conformable to law.' We think the property of an insolvent corporation is in the custody of the law to the same extent and for the same purposes, when transferred to a receiver under § 1942, as when transferred to a trustee under the insolvent Act, and that the principle of the rule in respect to the participation of secured creditors in the distribution of such property, which is obligatory in the latter case, ought to be applied in the former. This is just and required by the insolvent Act."

The rule so laid down governs the present case. It appears by the finding that the receiver recovered judgment in Pennsylvania on the 10th day of February for more than $2,000 against the Electrical Supply and Construction Company, and that of that amount more than $1,000 was paid to the receiver prior to the 1st day of March, 1897. On the last mentioned day the Cable Company—the present claimant—brought its action in Pennsylvania against the Greeley Com-

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pany upon the same claim which it now asks to have allowed by the receiver, and garnisheed the unpaid balance of the said judgment. The action so brought has since gone into judgment, but at what date is not mentioned. The claimant company has at all times refused and still refuses to release its said garnishee attachment. Since the judgment in the garnishee suit the Supply and Construction Company has itself gone into the hands of a receiver. It has paid nothing to the Cable Company and it is uncertain now how much, if anything, can be recovered from it. The fact that the Supply Company had paid to the receiver more than half of the judgment he had recovered, would seem to indicate that at the time the garnishee suit was brought the judgment was worth its full face amount. No reason is given, or suggested, why the balance of the judgment in favor of the Greeley Company would not have been paid to its receiver by the Supply Company, or could not then have been collected in full, other than the said attachment. That balance at that time amounted to more than the claimant's whole demand. Its refusal at all times to release its attachment deprives it, we think, of all equity to have its claim allowed; and the receiver properly disallowed the claim.

In the argument in this court the Cable Company claimed that it ought to be allowed to go back into the Superior Court, prove the value of its judgment against the Supply Company, and have the excess of its present claim, if any, over and above such value, allowed by the receiver. As the record does not show that any such claim or offer was made in the Superior Court, we are not at liberty to consider it.

There is no error.

In this opinion the other judges concurred.

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THE SCHOLFIELD GEAR AND PULLEY COMPANY *vs.* JOSEPH J. SCHOLFIELD.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Under General Statutes, § 1111, and rule 17, § 5, General Rules of Practice (58 Conn. 585), the trial court in every civil action must cause the facts on which its final judgment is based, to appear of record, without regard to whether it is or is not to be made the subject of appellate proceedings.

While under Chap. 194, § 7, of the Public Acts of 1897, p. 889, the trial judge cannot be compelled to make a finding for purposes of an appeal, unless the draft submitted to him states the questions of law which it is desired to have reviewed, he nevertheless may make such a finding upon his own motion, and without any request; and it is entirely proper to do so where a request is presented which by a merely formal error is deprived of its mandatory effect.

Should the appellee, however, be prejudiced by the omission of the appellant to specify in the proposed finding the grievances which he desired to have reviewed, and his objections to such draft be overruled by the trial judge, this court, upon seasonable application, will grant him suitable relief.

Whether this court while sitting in one district can, on motion, pass an order regulating the disposition of an appeal pending in another, *quære.*

[Argued April 26th—decided May 4th, 1898.]

MOTION in the Supreme Court of Errors for permission to file a written application for an order vacating an appeal from a judgment of the Superior Court in New London County (*George W. Wheeler, J.*), and for a release of the stay of execution thereon. *Permission denied.*

The motion was presented to this court while holding its April term in the third judicial district, together with the application which leave was asked to file; and a rule upon the adverse party to show cause against granting the motion was issued by order of the court, returnable at a later day of the term.

The application was verified by affidavit, and stated the following case: Judgment was rendered on a verdict for

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damages in favor of the Scholfield Gear & Pulley Company against Joseph J. Scholfield, on November 18th, 1897, by the Superior Court for New London county. The defendant gave notice of an appeal, and in due season filed a proposed finding of facts, prefaced by a written request that it should be made by the court. It simply recited certain evidence offered, the instructions to the jury requested by him, and those actually given. No other paper was filed in the nature of a request for a finding. The plaintiff made written objection to the filing of any finding by the court, on the ground that no proper request for one had been filed, and no statement made of the questions of law which the defendant desired to raise for review. The court ruled that this ground of objection was insufficient, and proceeded to make and file a finding, which stated all these facts, (in order to give the plaintiff an opportunity for a review of its action in that respect), and also that the failure to file a proper request had not impeded the court in preparing its finding, nor, in its opinion, the plaintiff in preparing its requests for a finding. The defendant thereupon proceeded to take and perfect his appeal to the May term, 1898, of the Supreme Court of Errors, to be held in and for the second judicial district, and the same was allowed by the clerk. The plaintiff had applied in vain to the judge of the Superior Court who held the term at which the judgment was rendered, and made the finding, to withdraw the latter and direct the appeal to be erased from the record, and release the stay of execution.

The prayer of the application was as follows: "Wherefore your petitioner prays this honorable court, in the exercise of its general appellate and superintending powers, to issue appropriate process either to said judge who tried said case, or to the clerk of said court, or to both, requiring and ordering that said finding be withdrawn and erased from the record of said court in said case, and that said appeal be disallowed and erased from the record, and that no further proceedings be had or allowed in the prosecution of said appeal; that the stay of execution caused by the filing of said finding and the filing and allowing of said appeal be released, and

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that execution be ordered issued forthwith on said judgment in favor of the plaintiff; or for such other or further relief as the petitioner may be entitled to in the premises."

On the return day of the rule, counsel for both parties appeared.

Donald G. Perkins, for the plaintiff, in support of the motion.

The statute provides that the request *must* be in writing, and *must* contain a statement of the questions of law which the losing party desires to have reviewed *arising on his proposed finding.* Public Acts of 1897, Chap. 194, § 7. Strict compliance with this requirement is essential to the validity of an appeal. *White* v. *Howd*, 66 Conn. 266. The object of the statute is to apprise the opposite party and the court of the questions intended to be raised. *Ives* v. *Finch*, 28 Conn. 114. While this requirement was a matter of rule, the trial judge might possibly waive it or suspend it, but he cannot dispense with statutory requirements. The Supreme Court of the United States, in *Saltmarsh* v. *Tuthill*, 12 How. 387, say the courts cannot dispense with express statutory provisions regulating appeals. This case differs from *State* v. *Duffy*, 66 Conn. 555, in that here the judge has distinctly found and made part of his finding, that there was no such request, and he inserts this statement in his finding in order that plaintiff may have the Supreme Court determine whether the defendant is entitled to pursue his appeal. The fact that the proposed finding contained a copy of the charge and also of the requests to charge, does not make it a statement of the questions of law, and the judge did not so rule, but has found as a fact that no written request containing such statement of questions of law was filed. If the plaintiff has suffered a wrong in the premises, there must be a remedy, and we claim that it is by an application to this court. The written appeal is addressed to this court. The person with whom it is filed, and who takes the bond and who has charge of the appeal and the copy of record, is the clerk of this court, and must be subject to its orders and control in re-

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spect to the appeal. Gen. Stats. § 828. The trial judge in preparing a finding "is preparing a statement for this court as a necessary part of the process of this court." *Thresher* v. *Dyer*, 69 Conn. 409; *Johnson* v. *Higgins*, 53 id. 238. This court not only has "a supreme and final jurisdiction in the last resort for the correction of errors of law," but it must have inherent power incidental to such jurisdiction, to correct errors and enforce duties in connection with the appellate process in any case to this court. Const. of Conn. Art. 5; Gen. Stats. § 815; *Styles* v. *Tyler*, 64 Conn. 450; *Atwater* v. *Morning News*, 67 id. 527; *McNamara* v. *McDonald*, 69 id. 409. The Supreme Court of the United States in frequent cases has granted mandamus to compel the lower court to settle bill of exceptions and allow an appeal, and in a few cases has granted relief where exceptions were improperly allowed. *Saltmarsh* v. *Tuttle*, *supra*; *Davidson* v. *Lanier*, 65 U. S. 631; *Clark* v. *Hancock*, 94 id. 493.

W. A. Briscoe, for the defendant, in opposition to the motion, was stopped by the court.

BALDWIN, J. General Statutes, § 1111, provides that all courts shall "cause the facts on which they found their final judgments and decrees to appear on the record; and such finding, if requested by any party, shall specially set forth such facts." This was one of the innovations of the Practice Act of 1879; the former statute, for which this was substituted, only directing that "courts of equity shall cause the facts on which they found their decrees to appear on the record." Stat. Rev. of 1875, p. 444, § 10. Under the first of the Rules of Court for making up records of judgments under the Practice Act (58 Conn. p. 585, § 5), when there is no request for a special finding, a general finding of the issues for the prevailing party is "equivalent to a finding that all his material allegations which were put in issue" were true, and satisfies the law; but where only a part of these are found true, "the judgment must indicate the particular facts found."

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The duty thus cast upon the court is to be discharged in every civil action, whether the judgment is or is not to be made the subject of appellate proceedings.

In cases which may be brought before this court on appeal, if it becomes necessary for the proper presentation of the questions of law which are involved, that there should be any further finding than that prepared by or for the court in ordinary course, either as respects the facts in issue or the proceedings at the trial, the statute provides that the trial judge shall make it, on the written request of the party proposing to appeal, and that this request shall be presented in a prescribed form. Public Acts of 1897, Chap. 194, p. 889, §§ 6, 7. He cannot be compelled to make it unless such a request is filed, but without any such request he has a right to make it, of his own motion; and it is entirely proper that he should take such action where, as in the present case, a merely formal error in the papers presented is all that deprives them of their mandatory effect.

The statutory provision as to what such requests should contain is for the benefit both of the judge and the adverse party. The judge can waive the protection thus offered, for himself, at will; but the party might sometimes be seriously misled by the omission of his opponent to state in precise terms the grievances which he desired to make the subject of review. In such a case, should his objections to the request be overruled by the trial court, and his defense against the appeal be thereby prejudiced, while he could not plead this in abatement, he could, if necessary, obtain relief from this court on seasonable application, by an order giving him an opportunity to amend his counter-finding, or further time in which to prepare one, or modifying the finding made. *State* v. *Duffy*, 66 Conn. 551, 555.

The application, in the present instance, shows on its face that the appellee can have suffered no injury from the rulings of the trial court. Leave to file it is therefore denied, on the ground that it has no merits, and we have no occasion to discuss the other question presented by a motion addressed to this court while sitting in one district, for

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action with reference to a judgment rendered and appeal pending in another.

The motion is denied.

In this opinion the other judges concurred.

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NATHAN COHEN *vs.* AUGUST L. SCHNEIDER ET AL.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A plaintiff should not be nonsuited if there is any conflict of testimony as to the existence of the fact relied upon as the ground of nonsuit. In case of such conflict the credibility of the witnesses and the weight of the evidence are matters for the determination of the jury.

The Act of 1895 in relation to conditional sales of personal property (Public Acts of 1895, Chap. 212), has not changed the law of this State in respect to the retention of possession by the vendor of such property; goods so retained are still open to attachment by the vendor's creditors, although the sale was made and recorded as prescribed by the Act of 1895.

[Submitted on briefs April 19th—decided June 1st, 1898.]

ACTION of replevin brought to the Court of Common Pleas in New Haven County where the plaintiff in a trial to the jury before *Studley, J.*, was nonsuited, from which judgment he appealed for alleged error in the ruling of the court. *Error and nonsuit set aside.*

The complaint alleged that ever since the 9th day of July, 1897, the defendants August L. Schneider, doing business under the name of the Elm City Manufacturing Company, and Peter J. McNerney, had unlawfully detained from the plaintiff one soda water fountain, one ice cream machine, eleven ice cream cans and fourteen ice cream tubs, of the value of $150, the property of the plaintiff, and to the immediate possession of which the plaintiff on said day was and ever since has been entitled.

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The answer was a general denial, and a special answer alleging, in substance, that on the 8th day of July, 1897, Michael Tovorovsky of New Haven was indebted to August L. Schneider, one of the defendants, in the sum of $79.95; that on said day the other defendant, McNerney, a constable of New Haven, under a writ which Schneider had caused to be issued against said Tovorovsky for the purpose of collecting said debt, attached said goods; that they were replevied by the plaintiff while so held under attachment; that said goods were the property of Tovorovsky at the time of the attachment, and not of the present plaintiff, Cohen; but that Cohen, conspiring and agreeing with his son-in-law Tovorovsky to defraud the said Schneider and prevent him from collecting his said debt, now claims to be the owner of said goods so attached.

The plaintiff's reply denied the allegations of the special answer, that Tovorovsky was indebted to Schneider; that the goods belonged to Tovorovsky at the time of the attachment, and that Cohen and Tovorovsky had entered into an agreement for the purpose of defrauding Schneider.

In presenting his case in chief, the following instruments, which were marked respectively plaintiff's Exhibits A and B were offered and received, with evidence that both said instruments were executed and delivered on the 24th of June, 1897, as parts of one transaction; and that Exhibit B was witnessed and duly acknowledged and recorded on the 25th of June, 1897.

Exhibit A was as follows: "In consideration of one dollar and other valuable consideration received to my full satisfaction of Nathan Cohen, of the town of New Haven, I hereby sell, transfer, assign, and give over unto said Nathan Cohen the following articles of personal property, to wit: 1 safe, 1 soda water fountain, 1 ice cream making machine, with 27 cans with tubs, 1 hose, 1 candy stove, 1 drop machine, 1 roller, 1 marble slab, 1 copper boiler, 1 warmer, 4 knives, 1 horse and harness, and 1 cocoanut scraper, to have and to hold the same to his own use forever and to the use of his heirs and assigns. And I hereby guarantee that I

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have good right to sell the same as aforesaid, and that I will defend the above to him against all persons whatsoever. In witness whereof I have hereunto set my hand and seal, this 24th day of June, 1897, New Haven, Connecticut. In presence of Isadore A. Stein. Michael Tovorovsky. (L. S.)"

Plaintiff's Exhibit B reads as follows: "This agreement entered into this twenty-fourth day of June, 1897, between Nathan Cohen and Michael Tovorovsky, both of the town of New Haven, witnesseth, that said Cohen hereby leases to said Tovorovsky the following articles of personal property, to wit: 1 safe, 1 soda water fountain, 1 ice cream making machine, with 27 cans with tubs, 1 hose, 1 candy stove, 1 drop machine, 1 roller, 1 marble slab, 1 copper boiler, 1 warmer, 4 knives, 1 horse and harness, and 1 cocoanut scraper, for the term of three months and six days, or until October 1st, 1897, for the rental price of one hundred and fifty dollars, payable on the first day of October, 1897. In consideration of the above said Tovorovsky agrees to take proper care of said above described property, and to do all the repairing that may be necessary to do to keep the same in good order.

"It is hereby agreed between the contracting parties that if said Tovorovsky shall pay to said Cohen the sum of one hundred and fifty dollars as aforesaid, to wit, on October 1st, 1897, then the above described property shall remain the property of said Tovorovsky, and said Cohen shall give him a bill of sale for the same. In witness whereof we have hereunto set our hands and seals the date above written.

"Isadore Stein, Nathan Cohen, [L. S.]
"Louis Coleman. M. Tovorovsky. [L. S.]"

"County of New Haven, ss. New Haven, June 24th, 1897.

"Personally appeared Nathan Cohen and Michael Tovorovsky, signers and sealers of the above, and acknowledged the above to be their free act and deed, before me,

"Isadore A. Stein, Justice of the Peace."

The only witnesses called for the plaintiff, were the plaintiff Nathan Cohen, and his son-in-law, the said Michael Tovorovsky. These witnesses testified that the consideration

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of the sale to the plaintiff was a previous indebtedness of Tovorovsky to Cohen of $25, and $100 in cash paid by Cohen to Tovorovsky on the day of the transaction; that the goods were in the cellar of the building where Tovorovsky carried on the ice cream and soda water business, that the plaintiff there examined them, and that after the execution of Exhibits A and B they were permitted to remain in the possession of Tovorovsky as before. Both witnesses testified that subsequently, and before the commencement of the present suit, Tovorovsky, being unable to carry on the business, delivered up the goods to Cohen, the plaintiff; that the goods were then in the cellar; that Tovorovsky took the key of the cellar to the plaintiff, and told him in effect that he surrendered the goods to the plaintiff, and that the plaintiff thereupon locked up the goods in the cellar and kept the key in his possession.

The plaintiff testified that the attachment in the suit of Schneider against Tovorovsky was made before the surrendering of the goods to him, and while Tovorovsky was in possession of the goods, under the contract of conditional sale. Tovorovsky testified that he surrendered the goods to the plaintiff the day before the attachment by Schneider. Tovorovsky also testified that within a few weeks after the goods were replevied from the officer, McNerney, the plaintiff Cohen went into the ice cream business, and that he, Tovorovsky, was employed by him.

The plaintiff having offered this evidence, the court, upon defendants' motion, granted a nonsuit, and denied plaintiff's written motion, duly filed under the statute, to set aside the nonsuit.

The errors specified in the plaintiff's appeal are the granting of the nonsuit by the court, and the refusal of the court to set aside the nonsuit.

Richard H. Tyner, for the appellant (plaintiff).

Benjamin Slade, for the appellees (defendants).

HALL, J. It does not appear from the record upon what

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ground the defendants' motion for a nonsuit was granted. From the briefs of counsel we assume that the ground of the motion for a nonsuit was that the plaintiff had not made out a *prima facie* case, since it appeared from the evidence that the goods in question, which prior to the execution of the bill of sale (Exhibit A) had been in the possession of Tovorovsky as his own property, were suffered to remain in his possession after the execution of the contracts A and B, and that Tovorovsky did not give the key to the plaintiff and surrender the goods to him, until after the attachment had been made by the defendants.

A careful examination of the evidence reported to us shows that the plaintiff should not have been nonsuited upon that ground. The evidence contained in the record does not clearly show when, with reference to the attachment, the property was so surrendered to the plaintiff by Tovorovsky. It is true that the plaintiff himself testifies that it was after the attachment, but Tovorovsky swears that it was before the attachment. It was for the jury to decide under these circumstances what the fact was. Counsel for the plaintiff should have been permitted to claim to the jury that the plaintiff was mistaken upon that point and that the testimony of Tovorovsky should be believed.

If the nonsuit was not granted upon the ground we have suggested, but because the court was of the opinion that the evidence showed that the transactions between the plaintiff and Tovorovsky were in fact fraudulent, it should be set aside. Though the court may have had sufficient reason to be satisfied that the testimony of the plaintiff and Tovorovsky was false or wholly unreliable, and that they were engaged in a scheme to defraud the creditors of Tovorovsky and to prevent the defendant Schneider from collecting his just claim, the case should nevertheless have been submitted to the jury. It was the province of the jury and not of the court to weigh the testimony of witnesses, and to pass upon the question whether the transaction between the plaintiff and Tovorovsky was in fact honest or fraudulent. General Statutes, § 1101; *Cook* v. *Morris*, 66 Conn. 196.

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It is suggested that since the contract of conditional sale (Exhibit B) conformed to the requirements of the Act of 1895 concerning conditional sales (Public Acts of 1895, Chap. 212) and was duly recorded, the plaintiff, under that contract, had a good title against the attaching creditors of Tovorovsky, although the plaintiff did not receive the key and possession of the goods before the attachment.

This claim cannot be upheld. The purpose of the Act of 1895 was not to enable vendors to make conditional sales which they could not have made before the passage of the Act, but to protect creditors and purchasers from the evils which had before resulted from the existence of lawful and valid conditional sales, but of which the public had no notice. *In re Wilcox and Howe Co.*, *ante*, p. 220. Conditional sales made in good faith, and which provided that the title to property should remain in the vendor until payment and that possession should go with the sale, were good against creditors of the vendee before the Act of 1895; but the reasoning of our courts, in sustaining such conditional sales, has been that the vendee in such contracts did not come into the possession of goods which he had owned before, and that in that respect they differed from the cases in which property owned by the possessor had been sold by him and possession retained by the vendor. *Lewis* v. *McCabe*, 49 Conn. 141. The effect of the Act of 1895 was to render conditional sales which should thereafter be made and which should not be made, acknowledged and recorded in conformity with the provisions of the Act, absolute sales as to creditors and *bona fide* purchasers of the vendee.

From the evidence in the case at bar it appears that Tovorovsky was the owner and possessor of the property in question, up to the day of the execution of the contracts A and B. On the 24th of June he executed a bill of sale of the goods to the plaintiff, and the latter, on the same day and as a part of the same transaction, executed the contract of conditional sale (Exhibit B) of the same goods to Tovorovsky, Tovorovsky at all times retaining possession until the time of the alleged surrender of the property to the plaintiff

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in July. To construe the Act of 1895 as rendering a contract of conditional sale made under these circumstances, valid as against creditors of the vendee who had attached before any delivery of the goods to the plaintiff, would be to cause greater evils to creditors and purchasers than those against which the Act was designed to furnish protection.

Had the evidence in this case clearly shown that there was no delivery of the goods in question to the plaintiff before the attachment in the suit of Schneider, that would have been a sufficient ground for granting a nonsuit.

As the record shows that both the plaintiff and Tovorovsky testified that the latter, before the present action was commenced, surrendered any interest he may have had in this property to the plaintiff, the nonsuit could not have been properly granted, as suggested in the brief of defendants' counsel, upon the ground that Tovorovsky and not Cohen should have been made the party plaintiff.

There was error, the nonsuit is set aside and the case is to stand for trial.

In this opinion the other judges concurred.

David B. Wheeler's Appeal From Probate.

Third Judicial District, Bridgeport, April Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

Whenever trustees to whom a testator devises a vested remainder have or may have immediate active duties to perform in respect to that interest, they are entitled to qualify as such trustees without waiting for the termination of the life estate or for the filing of the executor's administration account.

If one of the two named as trustees declines or fails to qualify, the other may qualify alone and execute the trust.

[Argued April 20th—decided June 1st, 1898.]

Appeal from the refusal of the Court of Probate for the district of Oxford to confirm the applicant, David B. Wheeler,

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as testamentary trustee, taken to the Superior Court in New Haven County and tried to the court, *Ralph Wheeler, J.;* facts found and judgment rendered for the applicant, and appeal by the respondents for alleged errors in the rulings of the court. *No error.*

Joel B. Wheeler, late of Oxford, died on the 9th day of January, 1891. He left a will which was on the 22d day of the same month duly approved by the Court of Probate in the district of Oxford. The first paragraph of the will provided that his debts be paid. The second gave to his widow, in lieu of dower, "the use of such portions of my estate, both real and personal, as may be necessary for her comfortable support and maintenance so long as she shall remain my widow. And she shall be the sole judge as to what amount of the income of my estate may be necessary and proper for her said support." The third paragraph gave to his daughter Mary Ann Tucker, after the decease or remarriage of his widow, the use for life of $1,000, "to be paid to her annually by the trustee hereinafter named." The fourth paragraph gave to his son David B. Wheeler, "after the interest of my said wife in my estate shall terminate," the homestead farm and another piece of land, to him and "his heirs forever." The fifth and sixth paragraphs read as follows: "V. All the rest and residue of my estate, both real and personal, whether in possession, expectancy, reversion, or remainder, and wheresoever the same may be located, I give in trust to the trustees hereinafter named, to be managed by them and their successors for the use and benefit of my four daughters, Ellen Amelia Towsley, Flora Jennette Cooper, Sarah Elizabeth Hill, and Martha Irene Stoddard, share and share alike, during their several lives; but on the death of any one of my said daughters her proportion shall vest absolutely in her heirs; and my said trustee on the death of any one shall cause to be distributed to the heirs of such deceased the one fourth part of this residue; and said trust shall cease on the death of the last of the aforesaid said four daughters. VI. I appoint as trustees to carry out the provisions of the foregoing trusts, David B. Wheeler of Oxford, and David W. Stoddard of Waterbury, Conn."

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The seventh paragraph named Henry C. Baldwin as executor. The said executor duly qualified on the 22d day of January, 1891. He died in January, 1897, without having fully completed the settlement of the said estate. In Febuary, 1897, Loren R. Carter was appointed administrator with the will annexed. The widow of the testator, who is still living, waived her right of dower in said estate.

On the 24th day of April, 1897, the said David B. Wheeler, one of the trustees named in said will, made application to the said Court of Probate, stating that he accepted the said trust, offered a sufficient bond, and asked that it might be approved and that he might be qualified to enter upon his official duties. The court thereupon appointed a day and a place for a hearing upon said application, and ordered that all persons interested be notified, which notice was duly given and such hearing was had; and the said Court of Probate found and decided, after setting forth the facts in the case, as follows: "Wherefore the court is of the opinion that said David B. Wheeler is not yet entitled to the care, custody, or management of said estate, or of any part thereof as trustee aforesaid; wherefore this court denies the prayer of said petition, and refuses to accept his bond as trustee." From that judgment the said David B. Wheeler appealed to the Superior Court. The Superior Court reversed the said decree of the Court of Probate, and ordered that the said David B. Wheeler be qualified by said Court of Probate as such trustee. From this judgment the respondents appealed to this court.

Charles W. Gillette, for the appellants (original appellees).

Arthur D. Warner, for the appellee (original appellant).

ANDREWS, C. J. The Court of Probate held that Mr. Wheeler was *not yet* entitled to be qualified as trustee under the appointment in the will of his father. The language of this decision admits that Mr. Wheeler is a fit person to be such trustee, and that the bond which he tendered is suffi-

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cient. At what time, or upon the happening of what event he will become entitled to be so qualified, is not indicated. Mr. Wheeler, as trustee, had a vested interest in the remainder estate as soon as the will became operative. Being a fit man and offering a sufficient bond, and there being no reason shown why he is not now entitled to be qualified, that court manifestly erred in not accepting his bond and permitting him to become qualified to act.

The brief in this court of the respondents seeks to nullify that error. It mentions three reasons why Mr. Wheeler is not yet entitled to become the trustee. The first is that he asks alone, not joining with the other trustee named in the will. This is a reason not urged in the Superior Court, and it is obviously untenable. Where two persons are named as trustees and one declines or fails to qualify, the other may qualify alone and perform the whole trust; Lewin on Trusts, *237; 1 Perry on Trusts, § 273; *Ellis* v. *Boston, etc., R. Co.*, 107 Mass. 1, 13; just as where two persons are appointed trustees to execute a trust and one of them dies, the other becomes the sole trustee.

The next reason urged is that the remainder estate devised to the trustees has not yet come into their enjoyment, the preceding life estate being still outstanding. But the devisees of the remainder estate had a vested interest in it as soon as the will was established; and there may be occasions when their active interference will be required. This they could not do unless qualified as trustees. It is possible that the life tenant may commit waste, and then it would be the business of the trustee, as remainderman, to require security of her for the benefit of the remainder estate. *Terry* v. *Allen*, 60 Conn. 530, 541, 542. In the event of her death or remarriage circumstances might exist which would make it important that immediate possession should be taken by the trustee. These are some of the reasons why the trustee should be qualified at once, rather than that his qualification should be postponed.

The third reason, and the one which perhaps influenced the Court of Probate, is that the estate is in the hands of the

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administrator with the will annexed. This reason wholly misconceives the powers and duties of an executor. An administrator with the will annexed simply finishes the work of the executor, and has for that purpose the same powers as the executor. In the will of Joel B. Wheeler the executor had no powers other than such as the law attaches to that office. No special powers were confided to him. The duty of an executor is to settle the estate, and in ordinary cases, of which this is one, that is his whole duty. Our law is solicitous that the estates of deceased persons shall be settled as soon as it can conveniently be done; *Webster* v. *Merriman*, 9 Conn. 225, 228; so that the property shall as soon as possible come into the possession of those who are to have the enjoyment of it. It is no part of the duty of an executor or administrator to carry on the business of the deceased. *Hallock* v. *Smith*, 50 Conn. 127. An executor has no title to, or possession of, the property of the testator, except for the purpose of closing the estate and settling its affairs. In the present case the duty of the executor was exceedingly simple. He was to pay the debts and then distribute the estate to those persons who were under the will entitled to it. The statute, § 581, directs the Court of Probate to limit a time not exceeding twelve months in which all claims must be presented to the executor, or be barred of recovery. Presumably such an order was made in this estate. The executor in this case was qualified on the 22d day of January, 1891. That the estate remains unsettled six or seven years after that date would, unexplained, seem to indicate that the executor had been inexcusably dilatory, or that the Court of Probate had been remiss in not calling on him to settle his accounts. In no event does he have, nor can he have, any such title to or care of the remainder estate as prevents the trustee from being entitled to qualify and act.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

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HYGEIA DISTILLED WATER COMPANY *vs.* THE HYGEIA ICE COMPANY.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Exceptions to the action of the trial court in finding and refusing to find certain alleged facts from conflicting testimony, cannot avail the defeated party upon an appeal to this court.

In an action to restrain an infringement of the plaintiff's trade-mark, the defendant claimed and offered evidence that the word "Hygeia," constituting the alleged trade-mark, was in common use for business purposes long before its adoption by the plaintiff, and that the latter had acquiesced in its registration and use as a trade-mark by a third person. *Held* that in rebuttal the plaintiff might introduce the record of a judgment in its favor in an action against such third person for an infringement of its right.

The plaintiff offered evidence to show that the products of both parties were on sale at the same or different places in the same city. *Held* that as relevant to that inquiry a witness who had made purchases might be permitted to state what article he called for and what he received.

The determination of the trial court as to the qualifications of an alleged expert will not be reviewed by this court upon appeal, unless it is clear from the record that such ruling was based upon incompetent or insufficient evidence.

In its defense the defendant contended that the word "Hygeia" had acquired the well defined secondary meaning of "healthful" or "health-giving," and as such was one of those common descriptive words that could not be lawfully appropriated as a trade-mark. *Held* that the question thus presented was to be determined by the trial court upon its judicial knowledge aided by reference to standard authorities, or by evidence, or by both.

In the present instance the court having heard evidence upon this point, decided against the defendant's contention. *Held* that upon the facts disclosed by the record this ruling was correct.

The trial court enjoined the defendant from engaging in any way or manner in the business of selling distilled water and products made therefrom, so long as it retained the word "Hygeia" as a part of its corporate name, and from using its corporate name, conspicuously or otherwise, in such business. *Held* that the facts found did not warrant such a sweeping decree, and that for this error the entire judgment must be set aside and a new trial be granted.

[Argued April 20th—decided June 1st, 1898.]

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SUIT to restrain the defendant from infringing the plaintiff's trade-mark, brought to the Superior Court in New Haven County and tried to the court, *Roraback, J.;* facts found and judgment rendered in favor of the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *Error and new trial granted.*

The complaint consists of three counts, in each of which it is alleged, in substance, that the plaintiff is the owner of a trade-mark or name consisting of the word "Hygeia," and has the sole and exclusive right to use the same in connection with the business of making and selling distilled water and products made therefrom; and in each of them it is also alleged in substance that the defendant has wrongfully used and is wrongfully using said word in connection with its business of making and selling distilled water and the products thereof.

The first count relates to the wrongful use by the defendant of the word "Hygeia" in its corporate name; the second to the wrongful use by the defendant of said word as a trade-mark or name to designate its products; and the third charges in substance that the defendant adopted and used said word in its corporate name and in its business, fraudulently, to the great damage of the plaintiff.

The first defense to each count is, in substance, a general denial of the material facts alleged. The second defense to all the counts alleged, in substance, a prior and concurrent use of the word "Hygeia" by others, and that the defendant had so marked its goods as to prevent confusion. The second paragraph of the second defense reads as follows: "2. The word 'Hygeia' has been in use for a great many years by different corporations and partnerships in connection with their business, both ice and water companies, and was in use long before the plaintiff claims to or did in fact use the same in connection with its business, especially by the Waukesha Hygeia Mineral Springs Company, of Chicago, Ill. and Waukesha, Wis., who on the 14th day of March, 1893, registered their trade-mark in the Patent Office of the United States, a copy of which is hereunto annexed and marked Exhibit A."

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In Exhibit A, referred to in this second defense, the Waukesha Mineral Springs Company, an Illinois corporation, claims for its trade-mark, in the business of dealing in natural mineral water and beverages made therefrom, the word symbol "Hygeia," alleging that the same had been so used by it and its predecessors in the ownership of a certain mineral spring, since 1872.

The issues upon the first and third counts were found for the defendant. Upon the second count the issues were found for the plaintiff, with this exception: "that the acts of the defendant in making and selling ice as in said count alleged, are not an infringement of the plaintiff's rights and are not a damage to the plaintiff."

The court below made the following finding: "The plaintiff company is a corporation organized under the general laws of the State of New York on October 29th, 1885, for the purpose of carrying on the business of making and selling distilled water, carbonated water, vichy and seltzer waters, ginger ale, and other beverages, under the name of The Hygeia Sparkling Distilled Water Company. Subsequently it procured its name to be changed to The Hygeia Distilled Water Company, under which name it continues to exist and transact business in the city of New York.

"The defendant is a corporation organized under the general laws of the State of Connecticut in October, 1892. The purposes of its incorporation, as expressed in its articles of association, are to manufacture ice by artificial processes, to buy, sell, store and deal in ice and refrigerating substances, to buy, hold and sell personal and real estate and patents and patent rights convenient for the conduct of said business, and generally to do all things incidental and proper to the same. Said corporation is located in the town of New Haven.

"The name Hygeia was adopted and used by said defendant company at the suggestion and request of the De La Vergne Company, of New York city, manufacturers of artificial ice machines, the chief characteristic of which was the distillation and filtration of water, and the freezing of the same,

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producing a clear and absolutely pure ice from the waters thus purified.

"As descriptive of the quality of ice, and to show that the same as produced by these machines was first class, the De La Vergne Company came to term the product of their machines as 'Hygeia,' correlative to the term 'healthful,' and such term 'Hygeia' was used daily in the transaction of its business.

"In order to differentiate between the companies using its machines and those using machines of other companies which froze the water in its crude state, the De La Vergne Company induced a large number of ice companies engaged in the manufacture of artificial ice, to adopt the name 'Hygeia,' the defendant company being among the number.

"At the time this case was brought there were no less than seven ice companies, other than the defendant, using the name 'Hygeia' as a part of their corporate names in their business of manufacturing artificial ice, some of them having used that name since 1890. There was no evidence that the plaintiff company ever acquiesced in such use of the name 'Hygeia' by the De La Vergne Company, or by any of said ice companies, nor that said De La Vergne Company ever sold water or ice. None of said ice companies, other than defendant, is engaged in the business of selling distilled water or beverages.

"For several years prior to the incorporation of the plaintiff company a copartnership in the city of New York had been transacting and carrying on the business of manufacturing distilled water and using the same in the preparation and manufacture of artificial mineral waters and the other beverages hereinafter named, under the name of the Hygeia Sparkling Distilled Water Company.

"Said copartnership was the first to coin, adopt and appropriate the word or title 'Hygeia' in connection with the manufacture and sale of such products.

"The incorporation of the plaintiff company was procured by the members of said copartnership, and immediately after its incorporation the plaintiff acquired by assignment from

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said copartnership the business, good will, trade-marks and patent rights of said copartnership.

"The plaintiff company immediately engaged in and has since continued the business of manufacturing and selling distilled water, vichy, carbonic, seltzer, vichy with lithia, kissingen, club soda, ginger ale, sarsaparilla, lemon soda, and lithia water, using said distilled water as a base for the other products named. The plaintiff company (as well as its predecessor, said copartnership,) has continuously used the name 'Hygeia' as its trade-mark, to indicate to the trade and consumers that said several products were of its manufacture, and said products have been called by the plaintiff company by the following names: Hygeia Distilled Water (or Hygeia Water), Hygeia Sparkling Distilled Water, Hygeia Vichy, Hygeia Carbonic, Hygeia Seltzer, Hygeia Vichy with Lithia, Hygeia Kissingen, Hygeia Club Soda, Hygeia Ginger Ale, Hygeia Sarsaparilla, Hygeia Lemon Soda, Hygeia Lithia, and Hygeia Sparkling Lithia. The labels on a few of these products were changed from time to time in wording, but always retaining the word 'Hygeia' as its trade-mark. February 24th, 1896, the plaintiff company secured legal permission to change its name to The Hygeia Distilled Water Company, and since that time it has used the word 'Sparkling' as a part of its corporate name upon some packages containing its products.

"Said products have been extensively advertised under these names, and at the time of the defendant company's incorporation were extensively dealt in, used, and known to the trade and to the consuming public by these names.

"As used in said applications the name 'Hygeia' means and indicates in the trade and among the consuming public, that each of the said products to which such word is applied is the product of the plaintiff company, and such has always been its meaning when so used.

"The words in said designations, other than the word 'Hygeia,' are words which describe the nature, qualities, or ingredients of the several articles so named. The word 'Sparkling' is used in connection with other products than

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those of the plaintiff company, and indicates that the product to which it is applied is effervescent.

"The plaintiff company has spent a very large sum in advertising its product under said name and trade-mark, and has built up a large and valuable business in said articles of commerce; and the name or word 'Hygeia' has become and now is the conspicuous feature of the plaintiff's business, and of great value to it, not only as a trade-mark, but also as the conspicuous and distinguishing feature of its corporate name.

"The plaintiff company was at the time of the defendant's incorporation and now is entitled to the sole and exclusive use of the word 'Hygeia' in connection with the business of manufacturing and selling the distilled and artifical mineral waters and other beverages made therefrom.

"At the time of defendant's incorporation the plaintiff company had for a long time been and was then selling and shipping to many individuals and dealers within the State of Connecticut its various products. Among those by whom plaintiff's products were kept for sale during the year 1892, were Sisson & Company and Heublein Brothers, in Hartford, Heublein Brothers, N. W. Harris & Company, E. E. Hall & Son, and Gilbert & Thompson, in New Haven. One or more of said products had been conspicuously advertised in the newspapers in Hartford, and had been printed in the price list of E. E. Hall & Son, in New Haven.

"The incorporators of the defendant company intended and expected at the time of its incorporation to engage in the business of making and selling distilled waters and artificial mineral waters and beverages made therefrom. 'And the incorporators were told by their counsel who drew up the articles of association, that the purposes as described in the articles of association included the manufacture and sale of distilled water and its products.'

"The defendant immediately after its incorporation engaged in, and has since been continuously engaged in, the business of manufacturing, selling, and dealing in artificial ice, distilled water, artificial mineral waters, and other beverages. 'The defendant did not sell water and beverages in considerable quantities until the year 1895.'

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"The defendant has transacted said business under the name of The Hygeia Ice and Water Company as well as under the name of The Hygeia Ice Company.

"In the transaction of its business as aforesaid by the defendant, the word 'Hygeia' has been and is used by it, alone and in combinations, conspicuously upon its bill heads, letter heads, advertisements, labels, wagons, bottles, wooden boxes, cases, etc. 'A very large part of the custom of the plaintiff company is in distilled water for table use, delivered in jugs holding five gallons each, in which cases neither the jug nor the label thereon is usually seen by the consumer. A large part of the trade in beverages other than distilled water, of both the plaintiff and the defendant companies, is by the bottle or glass, delivered at soda water fountains, in saloons, over bars, and in restaurants.'

"From a comparison of the bill heads, advertisements, labels, etc., used by the defendant with those used by the plaintiff, and from the attending circumstances and evidence offered upon the subject, I find that the consumers and purchasers using ordinary care are liable to be misled, deceived and confused as to the products of the plaintiff and defendant, and that the continuance by the defendant of such improper and unlawful use of said name is well calculated to induce the belief in purchasers that they are buying plaintiff's products, when, as a matter of fact, they are buying defendant's, and that such continuance will result in irreparable damage and injury to the plaintiff.

"The plaintiff company has not at any time exercised or claimed the right to manufacture and sell ice.

"The plaintiff company did not learn of such use of the name 'Hygeia' in the manufacture and sale of waters and beverages by the defendant, until on or about May 27th, 1896, on which date the plaintiff by letter notified the defendant that it (the plaintiff) claimed the exclusive right to use said name, and asked the defendant to desist from such use.

"The defendant in support of the allegations of its answer offered evidence to prove that a certain mineral spring in Waukesha, Wisconsin, had been since 1872 called the

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'Hygeia Spring,' and that the waters from said spring had been sold by the successive owners of the spring under the name and designation of 'Hygeia Water.' Such evidence, however, did not establish a continuous and uniform use of the name 'Hygeia' in the sale of such water by the successive owners of said spring prior to the adoption of said name and trade-mark by the copartnership of which plaintiff company is the successor. Said evidence did not establish any use of said name in the marketing of the waters, but only that barrels used by the owners of the spring in making small shipments of water therefrom were stenciled with the name 'Hygeia'; nor was it proved that said name had ever been used by them except in combination with the name 'Waukesha,' or used in the sale of any other water or beverage than the natural water obtained from said spring.

"No use of said name prior to its appropriation by plaintiff's assignor, inconsistent with the rights claimed by the plaintiff, was proved by the defendant.

"On August 20th, 1886, the plaintiff made a contract with the then owners of said spring, for the purpose of defining the respective rights of the parties thereto in the use of the name 'Hygeia.'

"The plaintiff has never acquiesced in or consented to any use of the name 'Hygeia' by the successive owners of said spring, otherwise than as limited and defined by the terms of said contract.

"The defendant offered some evidence to prove that the water from said spring is now known to consumers in the Chicago market as 'Hygeia Water,' but did not offer other evidence to prove any use of the name 'Hygeia' or the manner of such use by the Waukesha Hygeia Mineral Springs Company on its labels, or otherwise; nor did it offer to prove that said company was the owner of said spring.

"The plaintiff, in rebuttal, offered certified copies of the pleadings in an action in the United States Circuit Court for the northern district of Illinois, in which the plaintiff company was plaintiff and the said Waukesha Mineral Springs Company was defendant, said action having been brought

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for the purpose of restraining the Waukesha Hygeia Mineral Springs Company from the use of the name 'Hygeia,' otherwise than as limited and defined in said contract. To the introduction of this evidence the defendant objected, but the court admitted the same, defendant duly excepting.

"Plaintiff also offered, in connection with such evidence, the final decree in said action, by which the Waukesha Hygeia Mineral Springs Company was enjoined from the use of the name 'Hygeia,' in accordance with the prayer of the plaintiff's complaint in said action. The defendant objected, but the court admitted the evidence, defendant duly excepting.

"At the trial, after proving the plaintiff's right to the use of said name 'Hygeia,' and the defendant's infringement thereof, plaintiff offered the evidence of Ernest C. Simpson, that at the request of the plaintiff he had made inquiries at stores and other places of business for Hygeia Water, Hygeia Lithia, Hygeia Ginger Ale, and Hygeia Club Soda, and that at some places he had been given the products of the plaintiff company and at other places the products of the defendant company, in response to said demands. This evidence was claimed for the purpose of showing that as a result of the defendant's infringement the defendant's products were known in market by the name applied to the plaintiff's products; that dealers who had on hand defendant's goods, when demand was made for goods of the plaintiff, turned out defendant's goods, and that thereby the public were liable to be misled. The court excluded the evidence for the purpose offered, the plaintiff duly excepting. The court, however, admitted the evidence for the sole purpose of proving that the plaintiff's and defendant's products were on sale at the same or different places in the same cities. The witness, having testified that he made his first purchase at Mix's drug store in New Haven, was asked by counsel for plaintiff: 'Now will you state what you asked for at Mix's drug store?' The defendant objected, but the question was admitted, defendant duly excepting.

"The plaintiff offered the testimony of Harris D. Colt,

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vice-president of plaintiff company, who testified, among other things, that at Heublein's restaurant in New Haven he had recently asked the waiter to bring him a bottle of Hygeia Lithia. He was then asked as follows: 'Did he bring anything in response to that demand? If so, what?' The question was objected to, but was admitted by the court for the purpose of proving what products they had at that restaurant, defendant duly excepting. The witness testified that defendant's product was brought to him. He was further asked whether at that time he ordered anything else in the way of mineral waters or beverages, and what he ordered. The defendant objected, but the question was admitted by the court, the defendant duly excepting. Said evidence was offered by the plaintiff to show that in response to another order the plaintiff's goods were brought, and was admitted by the court for the purpose of showing that both plaintiff's and defendant's goods were on sale at said restaurant.

"On the trial of the case the following question was put to Augustus C. Smith, the general manager of the plaintiff company: Q. Now, Mr. Smith, will you state the meaning in the trade of the word by which you have named and described the several products manufactured by your company? Objected to. Q. I will add to that question, in order to make it more apparent what the meaning is: for instance, Hygeia Distilled Water. Will you state the meaning of each of those words as understood and applied in the trade? Objected to. Court. Why? Mr. Ely. He has not shown any special knowledge as applied to the trade. The gentleman cannot give his own conclusions and make them evidence as to what is known in the trade. A manufacturer cannot come in and say: 'It is known to the trade so and so,' without establishing at least some reason for it. I think the conclusion is for your Honor, or some outsider. Court. Isn't this man an expert on the subject? Doesn't he know? Ought he not to know, having been in the business ten years? Mr. Ely. In his own business. He has products that are known to other people in the trade. It seems to me not, if your Honor pleases. I don't think he has shown himself quali-

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fied at all to testify to that. Question repeated. Court. I am inclined to admit that question, Mr. Ely. Admitted; exception. Mr. Daggett. I wish to state, your Honor, that it is directed not only to the understanding of the public as to these particular products, but the use of these words generally. Q. Will you please answer the question, Mr. Smith? A. The word 'Hygeia' as understood in the trade is a product in connection with water; as a product of the Hygeia Water Company, of New York. To this question the defendant objected and duly excepted. The witness then in response to further questions testified as to the meaning in the trade of the words 'distilled,' 'vichy,' 'seltzer,' 'sparkling,' 'still,' 'lithia,' 'club,' etc. The witness had previously testified that he entered the plaintiff's employ in 1887 as a traveling salesman, and had been actively connected with the business of selling the plaintiff's products ever since.

"Upon the foregoing facts the defendant claimed and asked the court to find: First. That the word 'Hygeia' is not a proper subject for a trade-mark. Second. In order to entitle the plaintiff to a judgment the use of the word 'Hygeia' by the defendant must have been such as to represent or induce the belief that the goods of the defendant were manufactured and sold as and for goods of the plaintiff, or must have been used by the defendant for the purpose of deceiving the public. Third. That on the facts the defendant is entitled to judgment. The court overruled the claims of the defendant, and rendered judgment for the plaintiff, as on file."

The material part of the judgment reads as follows: "Whereupon it is adjudged that the defendant and its officers, agents, employees and servants be and they hereby are each of them forever enjoined, under a penalty of one thousand dollars, against transacting business under the name of 'The Hygeia Ice and Water Company,' and, so long as the defendant shall retain its present corporate name, or any corporate name containing the word 'Hygeia' as a part thereof, against putting up, bottling, selling, offering for sale, or delivering distilled water in liquid form or for drink-

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ing use, or using distilled water as an ingredient in the making and compounding of ginger ale, soda water, lithia water and other artificial mineral waters, and also against using the word 'Hygeia,' either alone or in combination with other words, as a part of its corporate name or otherwise in and upon its signs, advertisements, letter heads, bill heads, circulars, printed matter, wagons, bottles, jugs, siphons, labels, corks, seals, wooden boxes and cases, packages, receptacles, or any other thing used by any of them in the business of selling or delivering distilled water in liquid form or for drinking use, or in the business of making, manufacturing, compounding, putting up, bottling, selling, offering for sale, or delivering ginger ale, soda water, lithia water, or other artificial mineral waters, in the preparation of which products distilled water shall have been used as an ingredient."

The assignments of error relate to the action of the trial court: (1) in overruling the defendant's claims as set forth in the finding; (2) in its rulings upon evidence; (3) in its findings of specific facts.

William H. Ely and *Howard C. Webb*, for the appellant (defendant).

The plaintiff has no sole and exclusive right to the use of the word "Hygeia": first, because the word is not entitled to protection; second, the word "Hygeia" was used by others in connection with the sale of water, long before the plaintiff used it. "Hygeia" is not a word entitled to protection, as it has become a term merely descriptive of the character and quality of the goods to which it is applied. *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 546; *Koehler* v. *Saunders*, 122 N. Y. 65–72; *Fisher* v. *Blank*, 138 id. 244–249; *Boardman* v. *Britannia Co.*, 35 Conn. 402–414; *Caswell* v. *Davis*, 58 N. Y. 223–233, 234; *Gilman* v. *Hunnewell*, 122 Mass. 139–148; Foster's Encyc. Med. Dict.; Webster's Dict. Applying this general doctrine to words, it has been held that the following words among many others were not entitled to protection: "Samaritan," *Desmond's Appeal*, 103 Pa. St. 126; "Imperial," *Beadleston* v. *Cooke Brewing*

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Co., 74 Fed. Rep. 229; "Hygienic," *Jaros Hygienic Co.* v. *Fluse Hygienic Co.*, 65 id. 424; "Gold Medal," *Taylor* v. *Gillies*, 59 N. Y. 331; "Club House," *Corwin* v. *Daly*, 7 Bos. 222. The word "Hygeia" by itself means nothing unless it means "healthful" or "health-giving." It does not show who is the manufacturer of the goods nor what the goods are. If this is true so far as ice is concerned, it must be equally true so far as water is concerned. "Hygeia Water" may mean the water made by the plaintiff, or the water sold from the Waukesha spring. It is only when the words "Hygeia" and "Water" have other words used with them that any ownership or origin is indicated, and this being so, the word, as a word by itself, is not entitled to protection. There is no claim that the trade-mark, as such, has been infringed, and such a claim cannot be made on the finding. The most that the plaintiff can claim is that the defendant has adopted a part of its trade name. The most cursory glance at the names of the two corporations at the time the defendant corporation was formed, shows that there is no similarity. The plaintiff's name was the "Hygeia Sparkling Distilled Water Co.," and the defendant's name "The Hygeia Ice Co." No case can be found where a person has been stopped from using a name to which he has a right, in carrying on a business which he had a right to carry on, in the absence of evidence showing fraud or confusion in fact on the part of the public. *Boardman* v. *Meriden Britannia Co.*, 36 Conn. 211; *Rogers Mfg. Co.* v. *Simpson, etc., Co.*, 54 id. 527; *Rogers & Brother* v. *Rogers*, 53 id. 121; *Munro* v. *Tousey*, 129 N. Y. 38–41; *Hygeia Water Ice Co.* v. *N. Y. Hygeia Ice Co.*, 140 id. 94. The restraining decree was erroneous in that it prevented the defendant from selling goods it had a right to sell under a name it had a right to use, provided it did not represent its goods as the goods of the plaintiff. *New Haven, etc., Co.* v. *Farren*, 51 Conn. 324.

Henry C. White and *Leonard M. Daggett*, for the appellee (plaintiff).

The plaintiff having established its title in the word-sym-

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bol "Hygeia" as a trade-mark in the sale of manufactured water and beverages, is not affected by its concurrent use of a formal device on its labels. That an accompanying device is not also appropriated by the infringer, is no reason for denying relief against the wrongful appropriation of a word-symbol. 26 Amer. & Eng. Ency. of Law, 416, 417, 429; *Filley* v. *Fassett*, 44 Mo. 169; *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688. The name "Hygeia" is such an arbitrary word-symbol that plaintiff may prevent its use by others in the manufacture and sale of water and beverages. That the word "Hygeia" suggests the idea of wholesomeness and purity in the water and beverages to which it is applied, does not prevent its adoption and use as a trade-mark. *Keasbey* v. *Brooklyn Chem. Works*, 142 N. Y. 467; 26 Amer. & Eng. Ency. of Law, 282; *Braham* v. *Bustard*, Cox, Man. Tr. M. No. 226.; *Penna. Salt Mfg. Co.* v. *Myers*, 79 Fed. Rep. 87. If the word "Hygeia" has come to be a generic name, indicating the quality of the article rather than its origin or ownership, such fact should have been established by evidence and included in the finding. *Burton* v. *Stratton*, 12 Fed. Rep. 696. The word "Hygeia" has been legally recognized as properly the subject of a trade-mark right. *Waukesha Hygeia, etc., Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. Rep. 438, 443. But even if the word has acquired a secondary meaning indicative of quality, plaintiff is yet entitled to have its use protected. *Burton* v. *Stratton, supra; Lawrence* v. *Tennessee Mfg. Co.*, 138 U. S. 537. If the use of the word "Hygeia" by defendant is likely to mislead purchasers and the public, such use is an infringement of plaintiff's trade-mark, against which preventive relief should be granted. *McLean* v. *Fleming*, 96 U. S. 245; *Seixo* v. *Provezende*, L. R. 1 Ch. App. 192; *Colman* v. *Crump*, 70 N. Y. 573; *Williams* v. *Brooks*, 50 Conn. 278; *Bradley* v. *Norton*, 33 id. 157. An actual deception of purchasers need not be shown by plaintiff to entitle it to an injunction. *Filley* v. *Fassett*, 44 Mo. 169; *Bank of Tomah* v. *Warren*, 68 N. W. 549; *Shaw* v. *Pilling*, 175 Pa. St. 78; *Taendsticksfabriks Akt. Vulcan* v. *Myers*, 139 N. Y. 364;

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New Home Sewing Machine Co. v. *Bloomingdale*, 59 Fed. Rep. 284; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, Cox, Man. Tr. M. No. 213. Trade-names are protected upon the same principles applied in the protection of trade-marks. The use of corporate names has been enjoined in the following cases: *Holmes, Booth & Hayden* v. *Holmes, etc., Co.*, 37 Conn. 278; *Van Auken* v. *Van Auken, etc., Co.*, 57 Ill. App. 240; *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 32 Fed. Rep. 94. The claims of law made by the defendant on the trial were properly overruled, as well as its objections to the testimony admitted.

TORRANCE, J. The assignments relating to the exceptions to the finding may be laid out of the case. They are all founded upon the action of the court in finding or in refusing to find certain facts from conflicting testimony, and therefore cannot be considered by this court so as to be available to the defendant upon this appeal. *Atwater* v. *Morning News Co.*, 67 Conn. 504; *Thresher* v. *Dyer*, 69 id. 404.

Before considering the questions based upon the overruling of the defendant's claims, it may be convenient to dispose of those relating to the rulings upon evidence, the first of which is the admission of the record in the suit of the plaintiff against the Waukesha Mineral Springs Company. This evidence came in by way of rebuttal. It was offered generally, and the objection to it was general. If, then, it was admissible for any purpose, the ruling complained of was correct; *Morris* v. *Bridgeport Hydraulic Co.*, 47 Conn. 279, 287; and it will be presumed that the trial court used it only for an admissible purpose. *Hurlbut* v. *McKone*, 55 Conn. 31, 46. One of the defenses was, in substance, that the word "Hygeia" was in common use both in the ice and water business long before the plaintiff or its predecessors in business used it, and that in 1893 it had been publicly registered as a trade-mark by the Waukesha Mineral Springs Company. The defendant offered evidence in support of this defense, and from that, and other evidence given without objection, relative to the dealings between the plaintiff and the Wau-

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kesha Mineral Springs Company, was entitled to claim and doubtless did claim that such common use of the word was known to the plaintiff and its predecessors in business and had been acquiesced in by them and it; and especially that it had been acquiesced in by the plaintiff after the registration of said trade-mark in 1893. The plaintiff was entitled to show in rebuttal that it had not, in any way inconsistent with the right which it now claims, acquiesced in such common use of the word "Hygeia," and to show this by any appropriate evidence, including its own acts and conduct. Prosecuting a suit to a finality for an infringement of its right is an act clearly tending to show a want of acquiescence in an invasion of such right, and the record of such suit was appropriate evidence of that act.

The precise objection now made to the admissibility of this record is that the defendant was not a party nor in privity with any party to it. Had the record been offered as evidence of any of the facts adjudicated in the suit, this objection would be a valid one; but it was not offered nor received for any such purpose, and the objection cannot prevail.

The next ruling upon evidence relates to the testimony of the witness Simpson. He, at the plaintiff's request, had, at stores and other places, asked for the plaintiff's products by name, and had at some places been furnished with the plaintiff's products, and at others with the defendant's products. Simpson's testimony to these facts was offered by the plaintiff to show that the defendant's products were known in the market by the name applied to the plaintiff's products, that dealers sold them as such and that thereby the public were liable to be misled. The court excluded the evidence for this purpose, but did admit it solely to show that the products of both parties were on sale at the same or different places in the same cities. Simpson having testified that he made his first purchase at a certain drug store in New Haven, was then requested to state what he there called for, and the defendant objected to the question. It nowhere appears that the question was answered, or that the answer, if given, did or could do the defendant any harm; but assuming that

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an answer was given, and that the objection was to that rather than to the question, and that the answer could possibly harm the defendant, we think the ruling was correct under the facts disclosed by the record.

The court had ruled that evidence of the fact that the products of both parties were on sale at the same or different places in New Haven, was admissible. This was, in effect, a ruling that such fact was or might be relevant and material under the issues in the case, and for aught that appears in the record, this ruling was correct. The defendant did not object to the ruling, and did not claim that such fact was irrelevant and immaterial. It objected generally to certain evidence of the fact. The only ground on which it now claims that this evidence was inadmissible is that the fact in proof of which it was offered was immaterial. This objection comes too late to avail the defendant now. We think the fact was material and the evidence objected to was relevant evidence of it.

The reasons which justify the ruling in regard to Simpson's testimony, justify also the ruling in regard to Colt's testimony. In both cases the evidence was substantially the same, the objection was the same, and it was admitted for the same purpose under substantially the same circumstances.

The last ruling upon evidence complained of relates to the testimony of Smith, the general manager of the plaintiff. He was asked as a matter of knowledge to state the meaning in the trade of certain names applied to the plaintiff's products. The defendant objected to this, substantially on the ground that it had not been shown that the witness had such knowledge. The witness had previously testified that he entered the plaintiff's employment in 1887 as a traveling salesman, and had been actively connected with the business of selling plaintiff's products ever since. The court, with all the evidence before it bearing upon this matter, decided that the witness had such special knowledge, and it does not appear that this decision was based upon incompetent or insufficient evidence. Under such circumstances this court will not review that decision. *State* v. *Main*, 69 Conn. 123, 141.

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The assignments of error based upon the claims overruled, are next to be considered, and the first of these involves the question whether the word "Hygeia" could be appropriated as a trade-mark. The general principles to be applied in determining such a question are fairly well settled. A trade-mark is something used upon vendible articles to designate them as the articles made or sold by A, and to distinguish them from similar articles made or sold by B. Speaking generally, its office or purpose is to indicate the origin or ownership of such articles. When it consists of a word, that word must be capable of performing that office or serving that purpose. In law certain common words are not deemed capable of serving this purpose, as, for instance, words merely descriptive of the article, constituting its ordinary or known name, or indicating its ingredients, or its qualities, or properties, or its mode of composition, or the like. Such words cannot be appropriated as trade-marks. But a word not falling within the class of words incapable of being adopted as a trade-mark, may be adopted as one, although it cannot and does not of itself in any way indicate origin or ownership. If, by use as a trade-mark, such a word has acquired, by association in the minds of men, an understood reference to the maker or seller of the articles upon which it is used, that would entitle the owner of such trade-mark to protection. Under such circumstances a word may be a valid trade-mark, although it does not of itself indicate any particular person as maker or seller of the goods, nor his name nor address. *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Mfg. Co.* v. *Trainer*, 101 U. S. 51; *Godillot* v. *Harris*, 81 N. Y. 263; *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946, 39 Amer. Rep. 286.

The only ground upon which the defendant claims that the word "Hygeia" cannot be adopted as a trade-mark, is that "it has become a term merely descriptive of the character and quality of the goods to which it is applied," as healthful or health-giving. The parties were in dispute over this matter, and the question between them was one of fact. The defendant claimed, in effect, that "Hygeia" had become

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an ordinary English word with a fairly well defined secondary meaning, and the plaintiff denied this. The dispute, of course, related mainly to the time when the word was first adopted as a trade-mark by the plaintiff's assignor, and not to the time of the trial. The question thus presented was one to be determined by the court from its own judicial knowledge aided by reference to any appropriate authorities, or by evidence, or both. *Grennan* v. *McGregor*, 78 Cal. 258; *Com.* v. *Marzynski*, 149 Mass. 68; *Atty.-Gen.* v. *Dublin*, 38 N. H. 459; *School District* v. *Ins. Co.*, 101 U. S. 472. In the standard dictionaries the word "Hygeia" is uniformly used as a proper name and not as an adjective. In Webster's International Dictionary it is used solely as the name of the "Goddess of Health," while in the Century Dictionary it is used in this sense, and also as the name of one of the planetoids discovered in 1849. We are not aware of any standard authority that supports the defendant's contention upon this point. The court below heard evidence upon this question from both parties. It was in evidence that the word as late as 1893 had been registered in the patent office as a trade-mark, and this was entitled to weight in determining the question. "The authorities of the patent office, from long experience, are familiar with the law of trade-marks, and their decisions, though not conclusive, are entitled to great consideration by the courts in the determination of such questions." *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946, 952. It may be conceded, as claimed by the defendant, that there was evidence tending to show that at or about the time of the trial the word, to some persons, had acquired the secondary meaning it contends for, but the evidence was conflicting and may have arisen out of the very use which the plaintiff and its predecessors had made of the word in their business; and if this were so such evidence would be of little weight. The mere fact that the word, by association of ideas, would suggest to some persons the idea of purity or healthfulness, would not prevent its being available as a trade-mark word; *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467; and the fact that such association grew out of its use by the plaintiff and its predecessors would

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not make it common property. *Burton* v. *Stratton*, 12 Fed. Rep. 696; *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 id. 133. Upon the knowledge of this matter acquired by the exercise of its power of judicial cognizance, aided by evidence, and by reference to standard authorities upon the subject, the court below decided against this contention of the defendant, and we are of opinion that it decided correctly.

The next and last question to be considered is whether the court below erred in the judgment which it rendered.

The first count of the complaint alleged, in substance, that the defendant was wrongfully and unlawfully, in the conduct of its business of making and selling distilled water and products made therefrom, using its corporate name and an assumed name, to the injury of the plaintiff and in violation of its rights. The issues upon this count were found in favor of the defendant. The issues formed upon the third count also were found in favor of the defendant, and so these two counts may be laid out of the case.

The finding is, therefore, based upon the matters alleged in the second count of the complaint, and these relate to the infringement of the plaintiff's trade-mark. This count charges, in substance, that the defendant in the conduct of its business of selling distilled water in all its forms as a beverage, has used the word "Hygeia," both alone and in combination in its corporate and assumed names, conspicuously upon its goods and by way of advertising, in such a way as to constitute an infringement of plaintiff's trade-mark, and to make purchasers liable to mistake defendant's goods for plaintiff's goods.

The finding is not as broad or specific as the charge in the second count. The finding is that "in the transaction of its business as aforesaid by the defendant, the word 'Hygeia' has been and is used by it, alone and in combinations, conspicuously upon its bill heads, letter heads, advertisements, labels, wagons, bottles, wooden boxes, cases," etc.; and the court further finds "from a comparison of the bill heads, advertisements, labels, etc., used by the defendant with those used by the plaintiff," and from other evidence, that such use is liable to make purchasers using ordinary care mistake

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defendant's goods for plaintiff's goods. The finding thus states, in effect, that the defendant's use of the word "Hygeia," either alone or "in combinations," is a violation of plaintiff's trade-mark or name. What the "combinations" are that have been used or which constitute an infringement, is not stated. The second count alleged that the use of the defendant's corporate or assumed name in the distilled water business as a beverage, constituted such an infringing "combination;" but the court does not so find, either expressly or by implication. The most that can be said about the finding upon this point is, that certain "combinations" used conspicuously are infringements, and not that all are, however used. It is nowhere found, either expressly or by clear implication, that the mere ordinary use by the defendant of its legitimate corporate name constitutes such an infringement, or is liable to work the slightest injury to the plaintiff or to the public.

The judgment restrains the defendant from in any way or manner engaging in such business so long as it retains the word "Hygeia" in its corporate name, whether it uses such name in said business or not, and from in any way or manner using its corporate name, conspicuously or otherwise, in such business. It is conceded that the plaintiff has no monopoly of the business of making and selling distilled water and products made therefrom, as a beverage, and that any one may engage therein; the only claim is that any person engaging therein must not use the word "Hygeia" in such a way as to constitute an infringement of the plaintiff's rights in that word. We think the facts found did not warrant the court in rendering the sweeping judgment complained of in this case, and that for this error, under the circumstances of this case, the entire judgment should be reversed and set aside. Moreover, as the evidence in the case may possibly have warranted a broader finding than was made in the case, we think the ends of justice will be best subserved by granting a new trial.

Error, judgment set aside and new trial granted.

In this opinion the other judges concurred.

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THE MASONIC MUTUAL BENEFIT ASSOCIATION *vs.* RHODA M. TOLLES ET AL.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A member of a mutual benefit association originally designated his wife and two sons as the beneficiaries of his insurance policy or certificate, but afterwards changed such designation and made his wife the sole beneficiary. Two or three years before his death the assured requested his sons to carry the policy thereafter and relieve their mother, who had hitherto paid all the dues and assessments, from that burden; they agreed to this and for about a year did pay the assessments, but then stopped and the payments were continued by the wife, as before. In an action of interpleader brought by the association after the member's death, the sons claimed that upon the foregoing facts there was an implied agreement or trust which entitled them to two thirds of the insurance money. *Held* that, viewed in the most favorable light, such claim could not be supported, inasmuch as the sons had not paid the consideration upon which such trust or agreement was conditioned.

A consideration is as essential to an implied as to an express contract.

The beneficiary named in a certificate of insurance in a mutual benefit association has no vested interest in the sum insured, until the death of the member. Up to that time the member may, if permitted by the laws of the association, change the beneficiary at will, although the latter may have advanced money to pay the assessments on the certificate or policy.

[Argued April 21st—decided June 1st, 1898.]

ACTION of interpleader, brought to the Superior Court in New Haven County and referred to a committee by whom the facts were found and reported; the court, *Roraback, J.*, accepted the report of the committee and rendered judgment in favor of the claimant William D. Gilbert, executor, from which Eulie M. Tolles, another claimant, appealed for alleged errors in the rulings of the court. *No error.*

The allegations of the bill showed that Daniel B. Tolles was a member in good standing of the plaintiff association; that he died on the 28th day of February, 1896, and that thereupon the said association became liable to pay the sum

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of $2,000 according to the provisions of its laws, to his legal beneficiary; that Rhoda M. Tolles, widow of the said Daniel, and Eulie M. Tolles, a son, have each demanded the same sum from the plaintiff, and that it was ready and willing to pay the same to the party legally entitled thereto; and praying that the parties interplead concerning their respective claims to said money, and that the court should decide to whom the same belonged, to the end that the plaintiff be discharged from all further liability in respect thereto.

The court made an order that the parties interplead. The said Rhoda M. and Eulie M. then appeared and set forth their claims accordingly. Herbert D. Tolles made no appearance. The whole cause was referred to a committee who made his report, the court accepted the same, found the facts therein to be true, and held that the plaintiff should pay the committee's fees amounting to dollars, and should pay the balance of said sum to said Rhoda M. Tolles. From this judgment Eulie M. Tolles appealed to this court. The facts sufficiently appear in the opinion.

George P. Carroll, for the appellant (Eulie M. Tolles).

The appellant is at least entitled to the repayment of the $183.50 which he advanced to keep alive his father's membership; not as a creditor of his father's estate—for the money was not paid for his benefit; nor even as a creditor of his mother's estate—for his right was higher than that of a mere creditor. The fund itself became charged with a trust for the repayment to him of this amount with interest. *Conn. Mut. Life Ins. Co.* v. *Burroughs*, 34 Conn. 305; *Phœnix Life Ins. Co.* v. *Dunham*, 46 id. 79. Where a policy has been changed in favor of the new beneficiary, by the act of the insured, but in violation of the rights of the old beneficiary, the new beneficiary holds his legal claim to the proceeds of the policy charged with a constructive trust in favor of the old beneficiary. *Barry* v. *Brune*, 71 N. Y. 261; *Chapin* v. *Fellows*, 36 Conn. 132; *Whitehead* v. *N. Y. Life Ins. Co.*, 102 N. Y. 143; *Gardner* v. *Germania Life Ins. Co.*, 110 id. 266; *Pingrey* v. *National Life Ins. Co.*, 144 Mass. 374. The

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arrangement between the claimants was that the policy should be kept alive for the benefit of the three beneficiaries originally designated. In reliance on this arrangement, Eulie paid his third of the assessments. The violation of this agreement was a breach of trust that a court of equity will rectify. *Lemon* v. *Phœnix Mut. Life Ins. Co.*, 38 Conn. 294; *Catholic Knights of America* v. *Morrisin*, 16 R. I. 468, 471. Language, insufficient to constitute as a conveyance, will operate as a declaration of trust. *Drakely* v. *DeForest*, 3 Conn. 277; *Young* v. *Young*, 80 N. Y. 422; 1 Beach on Mod. Eq. § 161; *Swift* v. *R. P. & F. C. Ben. Asso.*, 96 Ill. 309; *Smith N. B. Society*, 123 N. Y. 85; *Bunnell* v. *Shilling*, 28 Ont. Rep. 336.

Edwin B. Gager, with whom was *William H. Williams* and *George C. Bryant*, for the appellee (William D. Gilbert, executor).

If Eulie M. Tolles had no right or cause of action against the plaintiff as to this fund, he ought not to succeed here. This is not a case of life insurance, as commonly understood by the courts. The law as to the rights of the members and beneficiaries of associations like that of the plaintiff, is very clearly settled. *Masonic Mut. Ben. Asso.* v. *Penfield et al.*, Superior Ct., New Haven county, 1887. A beneficiary has no vested right to the benefit, and the member may at any time substitute another person or class of persons, unless restrained by the rules of the society. *Barton* v. *Provident Mut. Relief Ass'n*, 63 N. H. 535; *Martin* v. *Stubbings*, 126 Ill. 387; *Union Mut. Ass'n* v. *Montgomery*, 70 Mich. 587; *Supreme Conclave* v. *Cappella*, 41 Fed. Rep. 1, 3; *Order of the Golden Cross* v. *Merrick*, 163 Mass. 374, 375; *Sabin* v. *Phinney*, 134 N. Y. 423; *Gentry* v. *Sup. Lodge K'ts of Honor*, 23 Fed. Rep. 718; 3 Amer. & Eng. Ency. of Law (2d ed.), 990. The insured may change his designation of the beneficiary at will, and against the consent of such beneficiary, in the manner prescribed by the rules. *Ingersoll* v. *Knight of Golden Rule*, 47 Fed. Rep. 274; *Holland* v. *Taylor*, 111 Ind. 129; Niblack on Benefits, § 220. A beneficiary named in a

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benefit certificate has merely a bare expectancy, which ceases upon his death during the life of the person insured. *Gutterson* v. *Gutterson*, 50 Minn. 278; *Martin* v. *Stubbings*, 126 Ill. 387; *Marsh* v. *American Legion of Honor*, 149 Mass. 512, 515; *Masonic Mut. Ben. Soc.* v. *Burkhart*, 110 Ind. 189; *Milner* v. *Bowman*, 5 L. R. A. 95; *Brace* v. *Chartrand*, 12 id. 210; *Hoeft* v. *Knights, etc.*, 113 Cal. 91; *Brown* v. *Grand Lodge*, 80 Iowa, 287. The law will not charge this benefit with a constructive trust, unless it is made necessary to prevent an unconscionable advantage or to frustrate a fraud. The mere fact of the payment of premiums gives the beneficiary no lien upon or right to the fund. *Fisk* v. *Equitable Aid Union*, 11 Atl. Rep. 84; *Brown* v. *Grand Lodge*, 80 Iowa, 287; Niblack on Benefits, § 227; *Byrne* v. *Casey*, 70 Tex. 247; *Supreme Conclave* v. *Cappella*, *Order of Golden Cross* v. *Merrick*, *supra*; *Jory* v. *Supreme Council*, 105 Cal. 20; Bacon on Benefit Societies, § 306. The facts do not sustain the claim of a "declaration of trust." Pomeroy's Eq. § 1009. At most the claim for the $183.50 became a debt of the father to Eulie; the latter acquired no lien upon the fund. Niblack on Benefits, § 284; *Fisk* v. *Equitable Aid Union*, *supra*, and cases cited with it. In no case could it exceed the amount paid subsequent to the date of the claimed agreement, February 27th, 1894.

ANDREWS, C. J. After the report of the committee was filed in the Superior Court, Eulie M. Tolles moved to amend his statement of claim. The court denied this motion. In most cases the allowance of an amendment to pleadings is within the discretion of the court. Perhaps there is nothing in this case to take it out of the ordinary rule. We have, however, no occasion to decide, because it is agreed by counsel that this court may consider the case as though the averments of the claim were ample to admit in evidence all the facts in the committee's report.

Daniel B. Tolles became an accepted member of the plaintiff association on the 11th day of February, 1878, and the plaintiff issued to him a certificate of membership; and there-

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upon the said association became liable to pay the sum of $2,000, according to the provisions of its laws, to his legal beneficiaries. In his application for such membership the said Daniel had designated, as the persons to whom the benefits were to be paid, his wife, the said Rhoda M. Tolles, and his two sons Herbert D. Tolles and Eulie M. Tolles. The laws of the plaintiff provided that "a member may change the designation of the person to whom said sum shall be payable," by giving a notice of such change in a prescribed way to the secretary of the association; and that the sum named in the certificate should be paid to that person who, at the time of the death of the member, was his designated beneficiary according to their laws and rules. On the 27th day of April, 1895, the said Daniel M. Tolles did change the designation of his beneficiary to Rhoda M. Tolles alone, according to the rules and forms prescribed by the plaintiff, and gave the required notice thereof and the board of directors accepted the same. If, then, regard is had only to the contract between the plaintiff and Daniel B. Tolles, the judgment of the Superior Court is correct and the said Rhoda M. Tolles is entitled to the benefit money named in the certificate.

Eulie M. Tolles, the appellant, however, insists that the judgment is erroneous by reason of other matters which, he says, ought to be considered. In his statement of his claims made in response to the order of interpleader, he alleged in paragraphs 8 and 9: "8. Prior to January 1st, 1894, and thereafter, the said Daniel B. Tolles became sick, despondent, and unable to work, and in consequence thereof lost interest in his membership in said association, and said membership was then in danger of lapsing and the proceeds thereof were in danger of being lost to said beneficiaries. 9. Under these circumstances, and as a matter separate and distinct from the contract of the plaintiff with the said Daniel B. Tolles, both about January 1st, 1894, and also before and after that time, said beneficiaries and the said Daniel B. Tolles mutually and severally agreed, in consideration of said beneficiaries paying the assessments and other money necessary to keep alive the membership of the said Daniel B. Tolles in

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said association, that said beneficial interest in the said $2,000 to be paid as aforesaid, should belong to and be the property of the said three beneficiaries for their equal benefit."

The committee found that the matters alleged in said paragraphs were not true. He adds: "It was claimed, in behalf of the said Eulie M. Tolles, that I should find as a fact that the parties entered into the contract set out in said (9th) paragraph, and also that such contract was implied in law under the facts and circumstances proved. In so far as the question is one of fact, I find as above stated; and in order that the question of law, if any there be, may be presented . . . I find as follows." He then sets out at some considerable length the facts in evidence, from which it is claimed that as a matter of law such a contract would be implied. Abbreviated, they are in substance like this: Daniel M. Tolles became a member of the plaintiff association on the 11th day of February, 1878. He continued to be a member in good standing, until his death on the 28th day of February, 1896. From the time he became a member up to the fall of 1893, all the dues and assessments were paid by Rhoda M. Tolles out of wages earned by herself. Sometime during that fall —the exact date is not given—the family were all together. Herbert had then just become of age, and Eulie was eighteen years old. At that interview the father said to his sons, that by reason of the expense incurred in the building of a house then being finished it would be hard for their mother to continue to pay the insurance, and asked them if together they would not carry it. They assented, and from that time until the 1st of August, 1894, all the assessments and dues paid during that period by any one were paid by the two sons. These payments were made in the expectation of sharing in the benefits. After August 1st, 1894, however, nothing was paid by either of them. All the payments after that date up to the time of the death of Daniel M., were made by Mrs. Rhoda M. Tolles. A Mr. Barlow was the agent of the plaintiff at Birmingham, Conn. It was from him, as such agent, that notice of the assessments, etc., were sent to the Tolles family, and it was to him that the assessments were paid. The assessments not always being paid promptly, Mr. Bar-

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low from time to time, in order to prevent the lapsing of the insurance, advanced the money necessary to make the payments. He made these advancements on the credit of the three beneficiaries. He did this, in some instances, between the fall of 1893 and the first of August, 1894, and was repaid by one or the other of the sons. He also made some advancements after the first of August, 1894; these were paid by Rhoda M. Prior to the 21st day of February, 1894, Eulie had requested his father to make him, Eulie, the sole beneficiary. The father declined to assent to this proposition without consultation with his wife. On said day and after a consultation with his wife and with her knowledge, the father wrote to Eulie in regard to said request that "he would never consent to make it over entirely to one." There was a letter from Eulie to his father dated the 6th of March, 1894, and on March 10th a reply from the father. These had reference mainly to the adjustment between the sons of the payments they had made. The claim of Eulie that he had paid very much more than his proportionate share of the assessments is negatived by the finding of the committee.

Upon these facts the said Eulie claimed in the Superior Court that he was entitled to have one third of the said $2,000, because: 1st, there was a contract between himself, the other beneficiaries named in the original certificate, and his father, that he should have that proportion; 2d, the law implies from the facts stated an agreement between the beneficiaries that the said sum should be divided in that way.

As a question of fact there was no contract upon which Eulie can depend; and we think the law does not infer any promise to Eulie from the facts found. Giving to the arrangement which was made between Eulie, his father, his mother and his brother, the construction most favorable to him, and even calling it a contract, there was in it the necessary condition that the payments should be kept up so long as Daniel B. Tolles lived. This contract, if it may be so called, was upon the consideration of "paying the assessments and other moneys necessary to keep alive the membership of the said Daniel B. Tolles in said association." And when Eulie failed during the lifetime of Daniel to continue

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these payments, he failed to perform the consideration on which alone his right to share in the $2,000 depended. An implied contract must have a consideration as certainly as an express one; and the failure to perform the consideration precludes any contract by implication, as fully as it precludes an express one. Where there is no consideration the law never implies a promise. *Davis* v. *Seymour*, 59 Conn. 531, 533; *Winehouse* v. *Cronin*, 68 id. 250, 253.

The claim of Eulie is put also in another form; that is, that Rhoda M. takes the $2,000 charged with a trust to pay one third of it to him, Eulie. The trust, if there is one, must arise out of the same circumstances from which the implied contract is said to come. But as there is no implied contract there can be no trust. A trust can be implied only when there is a consideration. Lewin on Trusts, 130. Eulie never had any vested interest in the benefits named in the certificate; there has been no payment of money by him, nor has there been any agreement respecting the same which made it a trust fund and entitled him to the benefit of being a *cestui que trust* therein. And there has been no fraud by Rhoda which would subject her to the liabilities of a trustee thereof.

"In case of an ordinary policy (of insurance), the right of the person for whose benefit a policy is issued cannot be defeated by the separate or joint acts of the assured and the company, without the assent of the beneficiary; while it is entirely well settled that in cases of this description the beneficiary has no vested interest in the benefit certificate until the death of the insured member. Up to this time (where the laws of the society so permit) he may change his designation of beneficiary at will, against the consent of such beneficiary, even though the latter may have advanced the money to pay the assessments upon the certificate." *Supreme Conclave, etc.*, v. *Cappella*, 41 Fed. Rep. 1, 3; Bacon on Benefit Soc. § 306; *Barton* v. *Provident Mut. Relief Asso.*, 63 N. H. 535.

There is no error.

In this opinion the other judges concurred.

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THE KNIGHTS OF COLUMBUS *vs.* THOMAS ROWE ET AL.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The charter and laws of a fraternal association provided that death benefits should be paid to such person or persons, belonging to the immediate family of the deceased member, as he might designate, and that in default of any designation the fund should go to those members of such family, or to relatives, who were the decedent's heirs at law. *Held* that this provision had reference to the conditions existing at the death of the member.

An unmarried man living in his father's family became a member of the plaintiff association, and in the certificate designated his father as his beneficiary. Subsequently he married and lived with his wife and newly born child apart from his father's family. While so living he died without having changed the original designation of his father as his beneficiary. *Held* that his wife and child constituted his immediate family and were entitled to the fund.

[Argued April 26th—decided June 1st, 1898.]

BILL of interpleader, brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.*; facts found and judgment rendered in favor of Annie E. and Mary A. Rowe, and appeal by the defendant Thomas Rowe for alleged errors in the rulings of the court. *No error.*

From the allegations of the complaint of the plaintiff, a fraternal benevolent corporation, it appeared that David J. Rowe died on the 11th day of December, 1885, and that at the time of his death he was a member in good standing in said corporation; that by its charter and laws it was under obligation to pay $1,000 to the person entitled thereto upon the death of the said member; that Thomas Rowe, the father of the said member, and Annie E. Rowe, his widow, make conflicting claims to said sum of money; and praying that these parties be required to interplead and set forth their respective claims, and that the court decide to which one the plaintiff shall pay said sum. The parties appeared and duly set forth their claims. Upon an order of the court to

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that effect, Mary A. Rowe, an infant child of the said David J. Rowe, was made a party to the proceeding, and appeared by her mother, the said Annie E. Rowe. The court heard the parties, found the issue for the said Annie E. and Mary A. Rowe, and rendered judgment that the plaintiff recover out of said fund the sum of $50, its costs of suit, and the further sum of $50 for the services of its attorney, and that it pay to the said Annie E. Rowe and said Mary Alice Rowe, each, the sum of $450, out of the balance of said fund, and that upon making said payments it be discharged from further liability as to said fund.

The finding of facts is as follows: "1. In May, 1885, David J. Rowe, then in full life but now deceased, became a member of the plaintiff organization, and at that time in due form designated his father, the defendant Thomas Rowe, as the person to whom the aid provided for in the charter of said organization should be rendered in case of his death. 2. Said David J. Rowe at the time he became a member of said organization, in the application which he filed for such membership, agreed that he should be bound by its charter and by-laws then in force, or which should thereafter be enacted. 3. It did not appear that any by-laws had been passed by said organization regulating the payment of any demands, before the passage of the amendment to its charter in 1889. 4. At the time said David J. Rowe became a member of said organization he was about twenty years of age; he was unmarried, and lived at home with his parents, as he thereafter continued to do until his marriage in 1893. 5. During the spring of 1893 said David married the defendant, Annie E. Rowe. November 16th of that year a child, the defendant Mary Alice Rowe, was born to them. 6. Said David J. Rowe died December 11th, 1893, leaving said three defendants surviving. 7. Said David J. Rowe owned, subject to his mother's life use, an undivided one half interest in the house in which his said parents occupied the downstairs tenement. His sister, one Mrs. Cleary, owned the other half interest. 8. Just before said David's marriage his mother, the wife of the defendant Thomas Rowe, died.

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9. After her death and David's marriage an unmarried daughter of the defendant Thomas Rowe, came to reside in his household as housekeeper, and took charge of it as her mother had done. 10. Thomas Rowe was the nominal head of said household, and contributed his earnings as a day laborer to its support, paying them over to his said daughter as received. 11. This daughter expended this money and the other household receipts as she pleased, and conducted the financial affairs of the household as its real manager and head. 12. Shortly after said David's marriage his wife came to live with him at his father's house, where their relation ever thereafter was solely that of boarders paying board. They had a separate room to themselves and ate at the family table. 13. Said David at the time of his marriage was, and for many years theretofore had been, and ever after during his life was, self-supporting, and in no way dependent on his father for support. He was employed as an engineer upon the railroad, receiving good pay. 14. After his wife came to live with him at his father's, as aforesaid, said David regularly paid for himself and wife $5 a week board, besides making no claim for rent for the tenement. His work called him away, so that he himself took few meals at the house. 15. November 14th, 1893, the defendant Annie E. Rowe, anticipating early confinement, went with her husband's consent to her mother's house to await that event, which followed two days later. 16. Before she was able to return her husband's last sickness began. She did not again return to the house to live, but was with her husband as much as her condition would permit until his death. 17. Said Thomas Rowe never after his said son David's marriage in any way, directly or indirectly, supported or contributed to the support of said David, or of the latter's said wife or child. 18. Said Thomas Rowe, on the other hand, was never in whole or in part supported by or in need of support from his said son David. 19. The designation made by said David, as set out in paragraph one, was never thereafter changed, but now stands upon the books of said organization as originally made.

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Upon the foregoing facts the defendant Thomas Rowe claimed and asked the court to find and rule: *First.* That said designation of the defendant Thomas Rowe, was not changed or invalidated either by the law of the plaintiff corporation, or by the marriage of the insured David J. Rowe, or by anything else. *Second.* That said Thomas Rowe was, both at the time of the designation of a beneficiary by said David J. Rowe and at the latter's death, a member of said David J. Rowe's immediate family, and as such was entitled to the benefit fund of $1,000.

The court did not find and rule as requested, but found and ruled that the defendants Annie E. Rowe and Mary Alice Rowe, and they alone, for some time prior to said David's decease and at the time of said decease, constituted the family of said David J. Rowe, within the meaning of the charter of the plaintiff corporation and the amendments thereto; and that said Thomas Rowe, at the time of said decease and for many months theretofore, was not a member of said David's family within the meaning of said charter; and therefore that the designation of a beneficiary originally made by said deceased as aforesaid had become void and of no effect at the time of said David's said decease, and rendered judgment as on file. Thomas Rowe appealed to this court.

Philip J. Markley, for the plaintiff (no brief).

Robert K. Waller and *Ernest Chadwick*, for the appellant (Thomas Rowe).

After the designation of the father, the charter of the company was amended, and in the amendment the power to name beneficiaries was expanded to take in relatives. The phrase "immediate family," as used in the amendment, includes father, mother, brother, sister, or child of a given person, or any one in short, who is but one step removed from that person. The amended charter has, however, no bearing on the present case. "An amendment to a constitution has a prospective operation." 3 Amer. & Eng. Ency. of Law

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(2d ed.), 262. *Smith* v. *Lyons*, 44 Conn. 178; *Benton* v. *Brotherhood, etc.*, 146 Ill. 570. The marriage of the assured did not affect his father's right to the benefit fund. *Young Men's Mut. L. Asso.* v. *Harrison*, 23 Weekly Law Bul. 360; *Benton* v. *Brotherhood, etc., supra; West* v. *Grand Lodge, etc.*, 22 Or. 271; *Brooklyn, etc., Asso.* v. *Hanson*, 53 Hun, 149; *Penn., etc., Asso.* v. *Folmer*, 87 Pa. St. 133. David J. Rowe had a right to name his father beneficiary when he did; that is not disputed. Neither is it disputed that Thomas Rowe was of David J.'s family at the time of such designation. He had a right to assume that his father was always a member of his family; that the change of the charter of the plaintiff corporation did not have a retroactive effect and render his designation void; that his subsequent marriage had no effect on his father's rights to the benefit; that the plaintiff company was under contractual obligations to do as they had agreed; and, in a word, that nothing but his own formal and voluntary act could change the beneficiary.

Walter C. Noyes, for the appellees (Annie E. and Mary A. Rowe).

Upon his marriage David ceased to be a member of his father's family, as the word is used in the charter, and became the head of his own family; and thereby the designation of his father became of no effect and the fund in question became payable to said David's wife and child, as constituting his family. When the charter of the insurer names a certain class to whom the policy or fund may be made payable, only those belonging to that class may become beneficiaries. 3 Amer. & Eng. Ency. of Law (2d ed.), 961 and cases cited. It is equally well settled, in the case of mutual benefit certificates, that the beneficiary has no vested interest in such certificate until the death of the insured member, and that such rights as he does possess are subject to revocation at any time. *Supreme Conclave* v. *Cappella*, 41 Fed. Rep. 3; 3 Amer. & Eng. Ency. of Law, 990. It follows from these principles that when a person, who at the time of a designation, belongs to a prescribed class, ceases to belong

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to such class, such designation becomes invalid. Aid which is to be rendered to a member's family upon his death, must be rendered to those who then compose such family, if the primary principle of these mutual societies is to be carried out. *Tyler* v. *Odd Fellows Asso.*, 145 Mass. 137; *Sanger* v. *Rothschild*, 123 N. Y. 577. It seems hardly possible, in view of the finding, to claim that the father, Thomas, was a member of David's family at the time of his death. It is found that "shortly after David's marriage, his wife came to live with him at his father's house, where their relation ever thereafter was solely that of boarders paying board." The word "family" has many different meanings. 2 Sto. Eq. (13th ed.) § 1065. See also *Cheshire* v. *Burlington*, 31 Conn. 329; *Elsey* v. *Odd Fellows Asso.*, 142 Mass. 224. The amendment of 1889 applies to the case. *Masonic Mut. Ben. Soc.* v. *Burkhart*, 110 Ind. 189; *Fugue* v. *St. Jos. So.*, 46 Vt. 362; *Borgards* v. *Mut. Ins. Co.*, 79 Mich. 440.

ANDREWS, C. J. By the Act incorporating the plaintiff (10 Special Laws, 927), and according to its laws in force at the date of the death of the said David J. Rowe, the plaintiff was obliged to pay, on the death of a member in good standing, $1,000 (1) to such person of his immediate family as the member should designate; (2) in default of an immediate family, then to such relative of the member as he should designate; (3) in default of any designation by the member, either within or outside of such family as above named, then such sum is to be paid to such family, or relative, who are heirs at law of the member, in the order above arranged.

At the time the said David J. Rowe became a member of the plaintiff corporation, he was a minor residing in, and was a member of, his father's family. At that time the designation of his father was strictly according to the laws of the plaintiff. At the time of his death his family was entirely changed. At that time his immediate family consisted only of his wife and child. *Wood* v. *Wood*, 63 Conn. 324. His father at that time was not a member of his immediate family. If the term "family" does not include an adult child living

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apart from the parent, it certainly cannot include the father of the adult child so living apart from the parent, as a member of that child's family. The designation, therefore, of the father, was at that time void. The money belonged to his immediate family.

There is no error.

In this opinion the other judges concurred.

ANTHONY W. ASHBORN *vs.* TOWN OF WATERBURY.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

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A plaintiff's right of recovery in an action of negligence rests upon and must be confined to the proximate cause of injury which is alleged and proved. But if that is done, it is immaterial that another proximate and concurring cause is incidentally disclosed by the evidence.

The plaintiff sought to recover damages for personal injuries alleged to have been caused by the defendant's neglect to maintain a railing along the edge of a highway embankment. *Held* that evidence that the plaintiff stepped into a slight depression or hollow in the highway and stumbled and fell off the embankment, was admissible, not to show a different proximate cause of injury from that alleged, but as tending to prove that at the time of the accident the plaintiff was in the exercise of due care.

[Argued April 27th—decided June 1st, 1898.]

ACTION to recover damages for personal injuries resulting from a defective highway, brought to the District Court of Waterbury and thence by the defendant's appeal to the Superior Court for New Haven County, and tried to the jury before *Roraback, J.;* verdict and judgment in favor of the plaintiff for $5,250 damages, and appeal by the defendant for alleged errors in the rulings and charge of the court. *No error.*

In describing the cause of action the complaint alleged that on the 18th of July, 1894, the defendant had wholly

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failed and neglected to maintain a fence or railing along the westerly side of South Main street in the town of Waterbury, nearly opposite the dwelling-house No. 1185 on said street, where said highway is so raised above the adjoining ground on the westerly side as to be unsafe for public travel; and that on said day the plaintiff, without fault or negligence on his part, in consequence of the negligence of the defendant in not maintaining said railing at said place, fell over and off said bank, and by reason of said fall sustained the injuries which were described. The statutory notice served upon the defendant contained a similar description of the nature and cause of the plaintiff's injury and the time and cause of its occurrence.

Upon the trial the plaintiff introduced evidence to prove that the highway at the place where he was injured was raised about sixteen feet above the adjoining ground; that the railing which had been erected had been thrown down so that at this point the south end of a rail lay upon the ground, while the north end remained fastened to its supporting post, the rail lying westerly of and outside of the line of the highway; that at about midnight of July 18th, 1894, while the plaintiff, in company with another person, was passing along a footpath about three feet wide, which ran parallel to and between the railing and the rails of a tramway, at a point eight or ten feet north of where he fell over the embankment, he stepped his right foot into a depression in the path, from three to six inches in depth, six or eight inches wide and about eighteen inches long; that this caused him to stumble and strike his other foot upon the paving stones laid upon the outside of the rails of the tramway, which stones extended into the path and projected above its surface, which caused him to stumble further, and that he fell against the railing which was partly down and, by reason thereof, fell over and down the wall and embankment.

Upon the trial the plaintiff testified: "I went off the bank. I tripped my foot, stepped my foot into a hollow or something, and tripped against the cobbles . . . kind of a gulley or hole there." Four other witnesses called by the plaintiff

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testified to the existence of such depression at this place, and to the projecting cobble stones in the path.

The defendant objected to this evidence as immaterial, and as proving a defect in the highway and a cause of the plaintiff's injury, not alleged in the complaint.

The defendant also objected to proof of the statutory notice given to defendant, upon the ground that the evidence showed that the depression in the path and the cobble stones were the cause of the accident, a cause not described in the notice. The court overruled said objections of the defendant and admitted said evidence and the defendant excepted to the rulings. Said rulings were assigned as reasons of appeal.

The defendant further assigns the following reasons of appeal. The court erred in charging the jury as follows: "The cause of the injury, gentlemen, is alleged to be the absence of a railing where the public travel was endangered by the want of it. That is a material allegation, and if the plaintiff has failed in his proof upon this point he cannot recover.

"And you are instructed upon this branch of the case, that if you find from the evidence that the absence of such railing was a proximate cause of the accident, without the operation of which the accident could or would not have happened, then the fact that the plaintiff stumbled over a railing which was down, which stumbling was caused by stepping one foot into a depression, and then striking the other foot against some cobble stones above the surface of the pathway, would not prevent the plaintiff from recovery, although the plaintiff did not give any notice of the depression or of the cobble stones to the selectmen of the town under the provisions of the statute, and although the depression and cobble stones are not mentioned in the complaint.

"The court erred, while admitting all evidence concerning depressions, holes and gullies in the road or pathway, and cobbles projecting or raised above the same, as a proximate cause of the injury — there being no allegations of the same in the complaint or notice — in charging the jury that when

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more than one proximate cause for an injury exists it is sufficient as a rule of law to allege all or one, thereby allowing the jury to receive evidence of a proximate cause not alleged in the complaint, and not set forth in the notice required by law, and thus to find a verdict under a complaint and notice averring a different proximate cause for the injury."

Greene Kendrick, for the appellant (defendant).

John O'Neill, for the appellee (plaintiff).

HALL, J. The evidence introduced by the plaintiff to show the existence of a depression in the highway near the place of the accident, and of projecting cobble stones at the side of the rails of the tramway, was manifestly neither offered nor received to prove a cause of plaintiff's injury different from that alleged in the complaint, but to prove the manner in which he came to fall over the defective railing.

The plaintiff was required to prove affirmatively that his own negligence did not essentially contribute to cause the fall. The main contention at the trial seems to have been upon this question. The defendant claimed that it appeared by the evidence that the night was clear; that the defect in the railing was obvious; that the plaintiff had been drinking; and that these circumstances clearly showed that the plaintiff's injuries were the result of his inability to exercise reasonable care to avoid the danger.

The evidence objected to was undoubtedly admissible as tending to prove that the fall was not the result of the plaintiff's alleged intoxication, but of an accident, not caused by the plaintiff's fault, concurring with the alleged negligence of the defendant. However well supported by evidence may have been the defendant's claim that the plaintiff was intoxicated, it still remained a question of fact for the jury whether the plaintiff's failure to exercise reasonable care essentially contributed to produce the injury. *Thorp* v. *Brookfield*, 36 Conn. 320. The jury having found that it did

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not, and having apparently accepted the theory of an accidental stumbling caused by the alleged depression in the path, or by the cobble stones, and without fault of the plaintiff, we cannot upon this appeal review their conclusion.

The fact that the plaintiff would not have fallen from the embankment had there not been the depression or stones in the highway, will not defeat his right to recover under the averments of this complaint and upon the statutory notice as proved, if the stepping into the depression or stumbling upon the stones in the path was either an accident, without fault of either plaintiff or defendant, or if, without fault of the plaintiff, but from the negligence of the defendant, or a third person, it was a contributing cause to the injury, of which the other was the defective railing. Shearman & Redfield on Negligence (3d ed.), § 10; 2 Thompson on Negligence, § 1085; *Carterville* v. *Cook*, 129 Ill. 152; *Carstesen* v. *Stratford*, 67 Conn. 428. In *Baldwin* v. *Greenwoods Turnpike Co.*, 40 Conn. 238–244, this court said: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable."

Had it been true in the case at bar that through the negligence of the defendant the highway was defective, both by reason of the faulty railing as alleged, and of the depression and stones in the pathway, and that both said causes contributed to cause the accident, and that without both it would not have happened, the plaintiff might, either upon a complaint alleging in one count both of said concurring causes,—the notice required by statute having described both causes,—have recovered on proof of either or both; or, upon a complaint alleging but one of such causes, that being the cause or one of the causes described in the notice, have recovered upon proof of the cause so alleged in the complaint. "Where several acts of negligence cause but one injury, the plaintiff may allege all the acts of negligence in one count and aver that they were the cause, and any one of them proved upon the trial will sustain his complaint." 2 Boon's

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Estee's Pleading (4th ed.), § 2013. "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes." *Ring* v. *Cohoes*, 77 N. Y. 83, cited with approval in *Carstesen* v. *Stratford*, *supra*.

Had the evidence shown that the existence of the depression and the presence of the cobble stones in the highway were the sole cause of the accident, so that it would have happened even though the railing had been sufficient, a recovery by the plaintiff would have been defeated by the fact that he had not correctly described the cause of his injury, either in his complaint or notice. But the jury have found that the depression and stones were not the sole cause of the accident. They have said by their verdict that the defective railing was the cause, and that had it not been for such defect in the railing the plaintiff would not have fallen from the embankment. The trial court, several times during its charge to the jury, distinctly called their attention to the fact that the cause of the injury as alleged in the complaint was the absence of a railing, and instructed them that the plaintiff could not recover without proof of that allegation. With reference to this subject the court used the following language in its charge: "The cause of the injury is alleged to be the absence of a railing where the public travel was endangered by the want of it. This is a material allegation, and if the plaintiff has failed in his proof upon this point he cannot recover. You are instructed upon this branch of the case, that if you find from the evidence that the absence of such railing was a proximate cause of the accident, without the operation of which the accident could not and would not have happened, then the fact that the plaintiff stumbled over a railing which was down, which stumbling was caused by stepping one foot into a depression and then striking the other foot against some cobble stones above the surface of the pathway, would not prevent the plaintiff from recovery, although the plaintiff did not give any notice of the depression or of the cobble stones to the selectmen of the town,

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under the provisions of the statute, and although the depression and these cobble stones are not mentioned in the complaint."

There is no error in the rulings or charge of the court.

In this opinion the other judges concurred.

JOSELYN E. LOVEJOY ET AL. *vs.* GEORGE A. ISBELL.

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73 541
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Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Section 896 of the General Statutes provides that before a non-resident shall commence a suit in this State, he shall "enter into a recognizance" to the adverse party "with some substantial inhabitant of this State as surety," or some "substantial inhabitant of this State" shall enter into a recognizance, conditioned that the plaintiff shall prosecute his action to effect. In 1885 surety companies of other States were authorized (General Statutes, §§ 3787, 3790), upon complying with certain conditions, to transact business in this State, and might "be accepted as surety upon the bond of any person or corporation required by the laws of this State to execute a bond, in lieu of any surety or sureties as now required by law." *Held* that this legislation, being remedial in character, ought to receive a liberal construction in order to accomplish its beneficial purpose; and that so construed it authorized the acceptance of the bond or "recognizance" of a surety company for costs in a civil action begun by a non-resident.

In giving a recognizance for costs the bondsman's undertaking is that of a surety, although the plaintiff is not formally joined as principal.

[Argued April 27th—decided June 1st, 1898.]

ACTION to recover damages for fraud, brought to the Superior Court in New Haven County and tried to the court, *Roraback, J.*, upon the plaintiffs' demurrer to the defendant's plea in abatement; the court overruled the demurrer and sustained the plea, and thereafter, pursuant to such ruling, judgment was rendered (*George W. Wheeler, J.*) for the defendant, and the plaintiffs appealed for alleged errors in the rulings of the court. *Error and judgment reversed.*

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The magistrate issuing the writ accepted the recognizance of the American Surety Company of New York, a corporation transacting business in this State as surety on obligations of persons, in pursuance of the laws thereof, in lieu of the recognizance of a substantial inhabitant of this State, mentioned in § 896 of the General Statutes. The defendant pleaded the acceptance of such a recognizance in abatement; the plaintiffs demurred, and the court (*Roraback, J.*) overruled the demurrer. An answer to the plea was then filed, and upon the issue joined the court (*George W. Wheeler, J.*), following the ruling on the demurrer, rendered judgment for the defendant. The plaintiffs appealed, assigning error in overruling the demurrer and also certain errors in the subsequent proceedings.

John Albert Matthewman, for the appellants (plaintiffs).

E. P. Arvine and *George E. Beers*, for the appellee (defendant).

HAMERSLEY, J. "An Act relating to Corporate Suretyship," passed in 1885, authorized corporations of other States organized "for the purpose of transacting business as surety on obligations of persons or corporations," to transact such business in this State; prescribed certain conditions for securing the solvency of such companies, and provided for their being sued here as if residents of the State. Public Acts of 1885, p. 469. This Act covered the whole business of suretyship on obligations, except in relation to bonds prescribed by statute. At the same session "An Act relating to the Giving of Bonds required by Law," was passed (Public Acts of 1885, p. 468), which provided that any company authorized to transact business as surety on obligations of persons or corporations, may "be accepted as surety upon the bond of any person or corporation required by the laws of this State to execute a bond, in lieu of any surety or sureties as now required by law, and such company may be released from its liability on the same terms and conditions as are by law pre-

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scribed for the release of individuals, it being the true intent and meaning of this Act to enable corporations created for that purpose to become the surety on bonds required by law, subject to all the rights and liabilities of private persons." These Acts appear in the General Statutes of 1888, §§ 3787–3801.

Section 896 of the General Statutes requires that before a magistrate can issue process in a civil action, the plaintiff therein, if he be not an inhabitant of the State, shall "enter into a recognizance to the adverse party with some substantial inhabitant of this State as surety, or some substantial inhabitant of this State shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect," etc. Such recognizance must be satisfactory to the authority issuing the writ.

In the present case the magistrate accepted the recognizance of the American Surety Company, duly authorized to transact in this State business as surety on the obligations of persons. The defendant pleaded in abatement the acceptance of the recognizance in lieu of the recognizance of some substantial inhabitant of this State, and the plaintiffs demurred. The Superior Court overruled the demurrer. This is error.

A recognizance is a bond in the strict sense of the word, and a statutory requirement to give bond with surety is satisfied by entering into a recognizance for that purpose. *New Haven* v. *Rogers*, 32 Conn. 221, 224. When the statute authorized any officer charged with the duty of approving such bonds, to accept a corporation as surety upon the bond of any person required by law to execute a bond, it included a recognizance as well as other bonds. It is claimed that the corporation was not in this case accepted as surety, but assumed an independent obligation; if this be true, it is only so in the most technical sense. The relation of principal and surety exists between the plaintiff and the corporation. It is the plaintiff that is required by law to give bond; in accepting the recognizance of the corporation the magistrate accepts the corporation as surety for the person who is by

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law required to give bond. That the formal joinder in the recognizance of the principal may in certain cases be dispensed with, does not alter the nature of the obligation. The corporation is still accepted as surety. In *Ripley* v. *Merchants' National Bank*, 41 Conn. 187, 190, it was intimated a bond for costs given by a surety might satisfy a statute requiring a bond by the plaintiff with surety, although the point was not decided. This was in 1874, and in 1875 the legislature passed the Act which now enables a bond for costs to be given either by the plaintiff with surety, or by the surety without the plaintiff. Public Acts of 1875, p. 24. The effect of this Act was to treat a bond by the surety as the equivalent of a bond by the plaintiff with surety.

It is claimed that section 896, in requiring the surety to be a "substantial inhabitant of this State," sought to give a peculiar protection to the defendant; that this protection has existed by law since 1703, and that a repeal of this law by permitting a foreign corporation to take the place of a "substantial inhabitant" must, to be valid, be direct and not by implication.

Attachment on mesne process was authorized in 1650, and the party taking out a writ of attachment was required to give "sufficient surety and caution" to prosecute his action and answer to the defendant for costs. 1 Col. Rec. 511. And this notion of a bond for prosecution as a surety for the good faith of the plaintiff in taking out his writ, as well as for his obligation to pay costs of suit, controls all additions to the original law. In 1703 it was enacted that when any inhabitant of a neighboring province shall take out any writ or summons to bring an inhabitant of this Colony to any of the courts thereof, "there shall be sufficient bond given by such person with good surety or sureties of substantial inhabitants of this Colony, to prosecute," etc. 4 Col. Rec. 410. In 1754 it was enacted that where the person issuing a writ of summons is satisfied that the plaintiff has not property sufficient to pay a bill of costs, he shall "require and take bond with surety that the plaintiff shall prosecute," etc. 10 Col. Rec. 316.

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It is evident that the law requiring an "inhabitant" as surety, in case of a non-resident plaintiff, was due in part, to the fact that in 1703 the neighboring provinces were wholly separate governments, and difficulties existed in enforcing the obligations of their citizens which did not exist after the war of the revolution, and especially after the adoption of our Federal Constitution. And so we find that the word "inhabitant" came to be regarded mainly as descriptive of a sufficient security. In the Revision of 1808, the surety of an "inhabitant" is required in case of a non-resident plaintiff who takes out a writ of summons, and also in case of a resident plaintiff unable to pay a bill of costs, who takes out a writ of summons; but a plaintiff who takes out a writ of attachment is required only to give "sufficient security." Statutes of 1808, p. 31. It is evident the phrase "substantial inhabitant," as used in this Revision, has lost something of its original significance. In the Revision of 1849 there are some changes in the phraseology, but the suggestion that the requirement of a "substantial inhabitant" as surety, is directed mainly to the sufficiency of the bond, remains. Rev. of 1849, p. 51. In the Revision of 1875, p. 397, and 1888, § 896, all distinction in bonds for prosecution is dropped, and the statute describes the sufficient security to be given where any bond is required, as "a recognizance to the adverse party with some substantial inhabitant of this State as surety."

The bond given by a foreign corporation under the statute of 1885, complies in every essential particular with the purpose of § 896. It is sufficient security; the surety is substantial,—possessed at least of $250,000, and found to be solvent upon examination by our State insurance commissioner; and if not strictly an "inhabitant," it is practically so for all purposes of being sued here on its obligations. A corporation organized in one State may so conduct its business in another as to become for some purposes a resident of the latter State. *Crouse* v. *Phœnix Ins. Co.*, 56 Conn. 176, 181; *New England Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138, 145.

The compliance by a corporation with the terms of the

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Act of 1885, certainly puts it in the position of a resident, so far as the facilities of bringing an action and obtaining a valid judgment against it depend on residence.

But assuming that § 896 requires the surety to be technically an "inhabitant" of this State, this requirement is simply descriptive of the surety; and the Act of 1885 says the corporation may be accepted as surety "in lieu of any surety or sureties as now required by law." Whatever kind of surety the law may require, the corporation may be accepted in lieu of that surety. This provision is not strictly a repeal of § 896; that section remains in force; the magistrate must still require as a surety some substantial inhabitant, unless he is satisfied with a surety of a slightly different description that the new law authorizes him to accept. So far as the Act of 1885 can be regarded as a repeal of § 896, it is clear and unmistakable in meaning and intent, and is not open to objections that may be urged to a repeal by implication.

The claim that surety company bonds are confined to fiduciaries, restricts the scope of the plain language of the statute.

The view we take is not free from difficulty, especially if a technical and strict rule of construction should be followed. The legislation of 1885 was adopted to give effect to the policy of encouraging the substitution of corporate for individual bonds, in all cases where suretyship is required. The statute is a remedial one. It seeks to supply a public need; to remedy a public evil. Such a statute should receive as liberal a construction as can reasonably be given, to effectuate its beneficial purpose. And so in determining whether bonds for prosecution are within the statute, the question is, are these bonds within the equity of the Act and are they fairly covered by the language used? We think they are.

There is no occasion to consider the effect of the statute in reference to bail bonds; and we do not pass upon that question.

As our conclusion disposes of the plea in abatement on its merits, there is no occasion to consider the other errors assigned.

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There is error in the judgment of the Superior Court upon the plea in abatement, that judgment is reversed and the cause is remanded for further proceedings according to law.

In this opinion the other judges concurred.

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EDWIN N. HUBBARD *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

In an action to recover for the destruction of property, without malice, the measure of damages is the market value of the property destroyed at the date of its destruction. No deduction from this value can be allowed the defendant upon the ground that if he had not destroyed the property the plaintiff would have subsequently lost a portion of it by other causes.

Chapter 220 of the Public Acts of 1897 provides that in a hearing in damages after a default or demurrer overruled, the defendant shall not be permitted to offer evidence to contradict the allegations of the plaintiff's complaint, unless he shall have given written notice of his intention so to do and of the subject-matter which he intends to contradict; and that the judges of the Superior Court shall make rules as to the form of such notices and manner of filing the same. *Held* that the Act prescribed a mere rule of procedure and affected pending suits as soon as, but not until, rules had been made by the judges.

[Argued May 3d—decided June 1st, 1898.]

ACTION to recover damages for the destruction of two ice-houses and their contents, claimed to have been set on fire by a locomotive of the defendant, brought to the Superior Court in Middlesex County and heard in damages to the court, *Robinson, J.*; facts found and judgment rendered for the plaintiff for $2,964, and appeal by each party for alleged errors in the rulings of the court. *Error on plaintiff's appeal and new trial granted; also error in expunging defendant's notice of evidence in contradiction.*

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The case is sufficiently stated in the opinion.

Hiram R. Mills and *Wesley U. Pearne*, for the appellant (plaintiff).

Clarence E. Bacon, for the appellant (defendant).

ANDREWS, C. J. There is error on the plaintiff's appeal. In any case where it is established that a party is entitled to recover damages for an injury done to his property without malice, the quantum of damages is to be computed as of the day the injury was done. In this case, it being conceded by the default that the plaintiff was entitled to have some amount of damages, the only question on which the court could decide was, how much? In respect to the ice, this question could be answered by ascertaining the number of tons there were in the houses on the day the fire took place, and its market price on that day. The court found the price to be, on the day of the fire, eighty cents per ton. But in ascertaining the number of tons for which the plaintiff is to be paid, the court, instead of taking the number of tons then in the houses, has taken only the number of tons which it estimated would remain on hand at the end of the next summer. This is error. The plaintiff is entitled to be paid for all the ice then in the ice-houses—less what was saved, if any—at its then market price. *Parrott* v. *Housatonic R. Co.*, 47 Conn. 575; *Regan* v. *New York & N. E. R. Co.*, 60 id. 124, 143; *Hurd* v. *Hubbell*, 26 id. * 389; *Cook* v. *Loomis*, ibid. 483; *Oviatt* v. *Pond*, 29 id. 479; 2 Sedgwick on Damages, 368. The defendant, having destroyed the plaintiff's property on a certain day, cannot justly be exempted from payment by alleging, or even showing, that if it had not destroyed the property the plaintiff subsequently would have lost it in some other way.

The only assignment of error on the defendant's appeal, though stated in various forms, is that the court erred in holding that the Act of 1897 (Chap. 220, Public Acts of 1897) applied to this case, and ordering the notice filed by

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the defendant to be expunged from the record. The defendant says that that Act affects only such actions as were brought subsequently to its passage, as is provided by § 1 of the General Statutes. On the other hand, it is urged that the Act in question does no more than make a rule of procedure; that is, a rule according to which, on the trial of a cause, evidence is to be admitted or rejected, and that rules of procedure must, and do, affect all trials alike, whether the cause was brought before or after the making of the rule; as, for instance, the statute passed a few years ago, that counsel should stand during the examination or cross-examination of a witness, and its repeal a year or two later. It was holden in practice that that Act, as well as its repeal, applied to all trials, irrespective of the time when the action was brought. We are inclined to think this is the proper construction to be put on the Act of 1897.

That Act, in its second section, provided that the judges of the Superior Court should make such rules as to the manner of filing the notice required to be given, and as to the form thereof, as they should deem proper. At the time the trial of this cause was had no such rules had been made. And although, so far as the legislature was concerned, the Act went into effect on the 15th day of July, 1897, it was not operative, so far as to affect an action pending, for the reason that the rules had not then been made. We think, therefore, that there was a nominal error in ordering the motion filed by the defendant to be expunged.

There is error on the plaintiff's appeal and a new trial is granted. There is also error in the order expunging the notice filed by the defendant; the order is reversed, and the notice should be restored to and be made a part of the files of the case.

In this opinion the other judges concurred.

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LAROY Z. CUTLER ET AL. *vs.* ROYAL INSURANCE COMPANY.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

An applicant for fire insurance in the *A* company, having received no response to his application, ten days thereafter took out a policy in the defendant company. This policy provided that if the insured then had, or should thereafter procure, other insurance upon the property, the entire policy should be void. Subsequently the policy of the *A* company, delayed in transmission, was received and retained by the insured. *Held* that the acceptance of this policy was a violation of the provision against other insurance contained in the policy issued by the defendant, and precluded the plaintiffs from a recovery.

Another clause in the policy issued by the defendant required the assured to maintain an insurance upon the property described of at least 80 per cent of its cash value, or, failing so to do, to bear his share of any loss. *Held* that whatever might be the effect of this clause in certain cases, it could not operate as an implied permission to procure other insurance, or as a waiver of the prohibition against such insurance, where, as in the present instance, the amount already covered by the policy in suit equalled or exceeded 80 per cent of the value of the property at the time it was insured and at the date of its loss.

[Argued May 4th—decided June 1st, 1898.]

ACTION to recover the amount of a loss under a policy of fire insurance, brought to the Superior Court in Hartford County and reserved by that court, *Ralph Wheeler, J.*, upon an agreed statement of facts, for the consideration and advice of this court. *Judyment for defendant advised.*

The policy sued upon was the standard form prescribed by the Public Acts of 1893, Chap. 226, and contained the following provisions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance,

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whether valid or not, on property covered in whole or in part by this policy."

There was also stamped upon the face of the policy the following: "*Standard Guaranty to Maintain 80 Per Cent. Insurance.* It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property described by this policy to the extent of at least eighty (80) per cent. of the actual cash value thereof; and that, failing so to do, the assured shall be an insurer to the extent of such deficit, and to that extent shall bear his, her, or their proportion of any loss that may happen to said property. Provided, however, that in the adjustment of any loss or damage by fire on stock or merchandise, no inventory for the purpose of ascertaining the application of the foregoing clause shall be required, unless the amount of damage is at least five (5) per cent. of the amount of insurance on such stock or merchandise. It is expressly understood and agreed that in case there shall be more than one item or division in the form of this policy, this clause shall apply to each and every item or division separately.

"*Note*—The co-insurance clause is not mandatory. The assured has the option of declining by paying a different rate. The co-insurance clause does not apply to dwellings and contents, unless specifically rated.

"Care should be exercised by the assured to see that at all times the amount of insurance on each item insured by this policy shall not be less than 80 per cent. of its value; otherwise its operation in case of partial loss might work to the disadvantage of the insured by decreasing the amount of his indemnity."

The policy was issued to Matthew Ferguson and Albert Beyer, and subsequent to the loss was by them assigned to the plaintiffs.

The defendant claimed that the policy was void, because the insured had fraudulently concealed material facts concerning the insurance; and because the insured had, after the policy was issued, without the knowledge of the defend-

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ant and without permission in any form, procured additional insurance on the property covered by the policy.

By stipulation of the parties the facts were found by the court, and the case reserved for the advice of the Supreme Court of Errors.

The finding, after stating the proof of the formal allegations of the fire, the damage, and proofs of loss, is as follows: "6. The court further finds that at the time the defendant issued said policy of insurance to said Ferguson and Beyer, the assured, said parties told the defendant that the value of the property insured under the first item was $1,200, and under the second item $500—which I find to be the value of said property at the time of the insurance,—and the assured also informed the defendant company that they intended to increase their stock of goods. 7. Ten days previous to the time of the taking out by the assured of the defendant's policy of insurance, to wit, September 4th, 1896, the assured had made an application to the local agent of the Ætna Insurance Company at said Manchester for a policy of insurance for the sum of $1,000, upon a portion of the same property insured in the defendant's policy, to wit, the stock of boots and shoes, the first item therein. Said policy in the Ætna Company was not delivered to the assured, nor was any communication received by said insured explaining its delay, until after they had received the policy in the defendant company. Because said Ætna policy had not been delivered to them pursuant to said application, and no communication had been received explaining its delay, the assured made application for a policy in defendant company, believing that the Ætna policy was not forthcoming. The assured did not communicate to the defendant the fact that said application for said Ætna policy had been made, nor had the defendant any knowledge or notice thereof at the time of issuing its policy. After receipt of the defendant's policy in suit, and before the fire, the Ætna policy was received by said assured and was retained by them. Said policy in the Ætna Insurance Company was a valid policy of insurance, dated September 4th, 1896, for the sum of $1,000. The delay in delivery

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of the Ætna policy was in fact caused by serious illness of the child of said insurance agent, which for a time suspended his business, but the fact was not known to the assured. 8. The form of defendant's policy of insurance issued to said Ferguson and Beyer is the standard form prescribed by the statute law of this State. The defendant refuses to pay the amount of insurance provided for in said policy of insurance, upon the ground of the concealment by the assured of said other insurance for $1,000 existing upon said property at the time this insurance sued for was taken out, and the subsequent acceptance of the Ætna Insurance Company's policy, without permission of the defendant, and claims that such pre-existing insurance and such subsequent acceptance of the Ætna's policy is in violation of the conditions of this policy which prohibits other insurance without written permission of the defendant company. At the time of the fire the value of the stock of goods on hand and insured was $856.87, and no more, upon which the insured had $1,100 insurance in the defendant company, and $1,000 insurance in the Ætna Insurance Company of Hartford, making in all $2,100 insurance upon $856.87 worth of stock. The value of the tools and machinery which the assured had on hand at the time of the fire was $66.95, upon which assured had $400 insurance in the defendant company alone under their policy of insurance aforesaid, making in all $2,500 insurance upon property valued at $923.82. I find that at the time the defendant issued its policy to the plaintiffs' assignors it had no knowledge of such prior insurance, or the subsequent acceptance of the Ætna Insurance Company's policy, and that it had not consented to or waived the provisions of the policy against other insurance, unless the consent or waiver appears upon the face of said policy, or upon the slips or riders attached thereto, by construction of law. Defendant claims a violation of the policy in the concealment of the $1,000 pre-existing insurance and subsequent acceptance of the Ætna policy, and fraud claimed as apparent of record. Defendant also claims that if the language of the riders or slips upon said policy can be construed as a permit for 80 per

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cent. insurance, or any other insurance, said permit was exhausted immediately upon the issuance of the defendant's policy to the plaintiffs' assignors, which, in fact, was for an amount greatly in excess of 80 per cent. of the plaintiffs' said property at the moment of its issuance and delivery. The question of what judgment should be rendered upon the foregoing facts is reserved for the advice of the Supreme Court of Errors."

Hiram R. Mills, for the plaintiffs.

The prohibition against other insurance can, at most, only operate to render the contract voidable at option of the insured, not void. It may be entirely waived by the insurer by any appropriate expression of purpose so to do. Its operation may be suspended and the company estopped from enforcing it by conduct inconsistent with an honest intent to rely upon it. The co-insurance clause annexed to the policy in suit operated as a waiver of the prohibition against other insurance. Instead of prohibiting other insurance, the policy in suit required the insured to maintain *at all times* co-insurance to the extent of at least 80 per cent. of the actual value of the property insured. The effect of the requirement to maintain 80 per cent co-insurance, though it is a clause of very recent origin and use, has been recently discussed in at least two reported cases, which have fully sustained the foregoing statements: *Pool* v. *Milwaukee Ins. Co.*, 91 Wis. 530; *Catoosa Springs Co.* v. *Linch*, 18 Misc. R. (N. Y.) 209. The Ætna policy was honestly retained. Its effect was beneficial to this defendant. It operated to reduce by one half the liability which this defendant would have been under if the Ætna policy had been returned instead of retained.

George A. Fay, for the defendant.

For more than half a century the expressed policy of all reputable insurance companies has been to prohibit "other insurance" which furthers the opportunity and leads to over-insurance, without written permission. The object of this

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prohibition is twofold: protection to the companies themselves and the public, also to guard against fraudulent fires. Over-insurance puts a premium upon incendiarism, threatens the solvency of insurance companies, and exposes the community to the greatest of perils. But assuming "other insurance" is permitted, and that the defendant company might have consented to "other insurance" to a limited amount, still there is a limit beyond which no responsible company would allow a party insured to go, irrespective of prohibitory clauses. The procurement of other insurance in violation of conditions against it, avoids the policy, and so is the statute law of our state. *Allen* v. *Ins. Co.*, 123 N. Y. 6; Pub. Acts of Conn., 1893, Chap. 226, pp. 372, 373; *Couch* v. *City Ins. Co.*, 38 Conn. 185. The cases cited by the plaintiff from Wisconsin and New York, do not necessarily conflict with the defendant's view of the law applicable to the facts in this case. In fact those decisions are in accord with the contention of the defendant, as to insurance in *excess* of 80 per cent. The logic of those cases is that the 80 per cent clause raises or creates an implied license to insure up to 80 per cent of value, but no further; *i. e.*, up to such an amount as would "free the insured from the risk of contribution."

HAMERSLEY, J. If, as appears from the finding, the insured, at the time of their application to the defendant, believed that their prior application to the Ætna Insurance Company for a policy of insurance for $1,000 upon property they were asking the defendant to insure, could not result in a contract of insurance, they were not bound by the terms of their policy to then inform the defendant of that application. But in subsequently accepting the Ætna policy issued in pursuance of their application, they violated the provision against further insurance contained in the policy issued by the defendant; and for this reason the plaintiffs cannot recover. "Precisely that had occurred which both parties had stipulated should make void the contract of insurance." *Bishop* v. *Clay Ins. Co.*, 45 Conn. 430, 453.

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The "standard guaranty to maintain 80 per cent. insurance," stamped on the face of the policy, did not supersede the provision against further insurance. The two provisions can stand together, and effect can be given to both. This "guaranty" clause in a fire insurance policy is of recent use and is a very peculiar one. We consider it only so far as necessary to the decision of this case. If, as the plaintiffs claim, the adoption of the clause imposes on the insured an obligation to procure such additional insurance as may be necessary to keep the total amount of insurance equal to 80 per cent of the changing actual value of the property covered by the policy, and therefore impliedly gives permission to procure, or waives the provision against, such insurance, it must follow that such permission or waiver is limited by the necessity from which it is implied. It may be that if, in fulfilling the obligation assumed, the 80 per cent limit is unintentionally exceeded, the policy would not for that reason become void; but a question of this kind does not arise in the present case. The insured obtained insurance for $1,500 on a stock of goods and fixtures valued at $1,700; the insurance being more than 80 per cent of the value of the property insured. Immediately afterward they procured additional insurance on the principal item of this property, for $1,000. Within twelve days the property is destroyed by fire, and its actual value at that time is less than $1,000. There is here no room for any claim that the additional insurance was intended merely to fulfill the obligation of the guaranty clause. The insured in fact and intent violated the provision against over-insurance. They certainly stand in no better position than if, having obtained permission for an additional insurance of $100, they then procured insurance for ten times that amount.

The Superior Court is advised to render judgment for the defendant.

In this opinion the other judges concurred.

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JOHN CHANNON *vs.* THE SANFORD COMPANY.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The reason for the general rule of law which requires the master to exercise due care to provide his servant a safe place in which to work, is that the master is ordinarily in the possession or control of the premises where the work is done. But where he has no such possession or control, actual or legal, and merely sends his servant to the premises of another to do certain work there, requested by the latter, the master does not incur any legal responsibility to the servant for the unsafe condition of such premises, unless, indeed, he specially, or upon the facts found impliedly, assumes such obligation.

The facts in the present case reviewed and held insufficient to justify an implied assumption of such an obligation.

[Argued May 4th—decided June 1st, 1898.]

ACTION to recover damages for personal injuries received through the claimed negligence of the defendant, brought to the Court of Common Pleas in Hartford County and heard in damages to the court, *Peck, J.;* facts found and judgment rendered for the plaintiff for $1,000 damages, and appeal by the defendant for alleged errors in the rulings of the court. *Error and cause remanded for assessment of nominal damages.*

The questions in the case arise entirely upon the finding of facts, which is as follows: "1. On June 3d, 1897, the plaintiff was sixty-seven years old, and had been for many years an ornamental plasterer. He was then, and for eight or nine months had been, in the employ of the defendant. 2. The defendant was, and now is, a corporation organized under the joint stock laws of the State of Connecticut, for the manufacture of plastic ornaments and decorations, and placing the same in buildings, located and having its principal place of business in the city of Hartford. 3. The defendant, in the spring of 1897, had made on the order of one John F. Caulfield, a mason and contractor of New Britain,

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certain plaster ornaments for St. Joseph's Roman Catholic Church, which at that time was in process of erection at New Britain by said Caulfield as general contractor. 4. Said Caulfield was an experienced mason and contractor, having been engaged in business as such for thirteen years. 5. The mason work and plain plastering of said church had been practically completed by said Caulfield, and the interior woodwork was being placed in position, when the injury to the plaintiff occurred. A solid and substantial staging had been built by said Caulfield or his workmen for the purpose of reaching said work, and stood about two feet distant from the walls, measured from the inside of the staging to the face of the walls. Said staging had been used and was being used by all the workmen engaged on the interior of the church. 6. After said ornament had been delivered to Caulfield he told the defendant that his men could not put it in place, and requested the defendant to place the ornamental work in position, and Caulfield agreed to furnish whatever was necessary, that is, staging, a helper, plaster, putty, etc. The plaintiff had no knowledge of this agreement, except as hereinafter stated. 7. On June 3d, 1897, the defendant, by its foreman, requested the plaintiff to go to New Britain and place said ornaments in position. The plaintiff told the foreman that he had never put ornaments in place, that he had never worked on staging in his life, and knew nothing about building them, and that he would not do it. These statements as to his lack of experience with, and knowledge of, staging were true. The foreman told him that Caulfield was to see to the staging, that the main staging was already in place, and that it had been used by all the workmen on the interior of the church, and assured him that the staging would be entirely safe. The plaintiff thereupon consented to go. 8. The plaintiff asked that he might have one Schwartzing as a helper, and the foreman agreed to send him with the plaintiff. 9. On the next day the plaintiff and Schwartzing went to New Britain. Defendant's foreman met them there by agreement, and took them to the church. He there pointed out to the plaintiff the places where the

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several ornaments were to go, and told him if he wanted any help, as for instance the bringing of water, plaster, or putty, or the shifting of any staging, to call on a workman then present, whom he pointed out to the plaintiff. This was one Burns, a mason in the employ of Caulfield. 10. Burns was an experienced mason, competent to build staging. He was paid by Caulfield. 11. The plaintiff was paid by defendant, who charged his time at an increased rate to Caulfield. He was in the exclusive employment and control of defendant while doing the work. He was himself in charge of this job, and received no orders from any one after beginning work. He did not in any way communicate with Caulfield. 12. The plaintiff and Schwartzing were engaged in placing the ornaments in position Friday, Saturday, and Monday, June 4th to 7th. On the afternoon of Monday the plaintiff was about to fasten up a frieze which ran between, and on the same level as, the capitals of two small pilasters, which latter projected from the wall about six inches, and were about fifteen feet from the floor. Up to this time they had used the main staging mentioned in paragraph 5 hereof. They could not conveniently reach the location for this frieze from the main staging, and the plaintiff asked Burns to make an additional stage, projecting from the main staging toward the wall. 13. Burns built said additional staging, but he negligently failed to properly support it, and it was not strong enough for the use required. 14. Almost immediately after the plaintiff went upon the staging it gave way and precipitated him to the floor. 15. The plaintiff was seriously bruised, and received injuries to the spine which have rendered him permanently unable to do the usual work of his trade, or any work except of a very light kind. He was confined to the house for three months, and has constantly suffered much pain. 16. The defendant suffered a default, and the hearing was as to the damages after such default. Upon the foregoing facts the plaintiff claimed that the negligence of said Burns in constructing the staging was imputable to the defendant, and constituted a breach of the duty owed by a master to his servant, and that substantial

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damages should be awarded. The defendant claimed that the negligence of said Burns was the negligence of a servant of an independent contractor, and was not imputable to the defendant. The defendant claimed further that the accident which caused the plaintiff's injuries was one of the risks of employment assumed by plaintiff; that if said Burns was not the servant of an independent contractor, he was a fellow-servant of the plaintiff, and that therefore defendant was not liable for his negligence, and that only nominal damages should be awarded. The court overruled the claims of the defendant, and rendered judgment for the plaintiff in the sum of one thousand dollars and costs of suit."

William Waldo Hyde and *Arthur L. Shipman*, for the appellant (defendant).

There can be no question but that, on the facts found, Caulfield was an independent contractor in furnishing the staging, helper, material, etc., within the definitions laid down in *Lawrence* v. *Shipman*, 39 Conn. 586, *Burke* v. *Norwich & W. R. Co.*, 34 id. 474, and *Norwalk Gas Light Co.* v. *Norwalk*, 63 id. 495. Burns was in Caulfield's employ and was paid by him. We have, therefore, the case of a contractee's employee, injured through the negligence of a contractor's servant, and the contractee's servant is attempting to hold the contractee liable therefor. The test of control as the proper one may be seen in all the independent contractor cases when the owner is attempted to be held liable to third persons, and even in very close questions, of which *Ziegler* v. *Danbury & N. R. Co.*, 52 Conn. 543, is an instance, where it was doubtful whether the plaintiff was the servant of the Danbury & Norwalk or the Shepaug road. It is the test in the line of cases of which *Johnson* v. *Lindsay*, L. R. (1891) A. C. 371, *Murray* v. *Currie*, L. R. 6 C. P. 24, *Rourke* v. *White Moss Colliery Co.*, L. R. 1 C. P. Div. 556, *Johnson* v. *Boston*, 118 Mass. 114, *Hasty* v. *Sears*, 157 id. 123, are instances, where the servants of one party were for the time being leased or lent to the defendant in the cause. See also *Butler* v. *Townsend*, 126 N. Y. 105; *Devlin* v. *Smith*,

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89 id. 470; *Hardy* v. *Sheddon*, 78 Fed. Rep. 610; *Cameron* v. *Nystrom*, L. R. (1893) H. L. 308; *Currier* v. *Henderson*, 86 Hun, 300. If Burns was not the servant of an independent contractor, he must have been the servant of defendant and, if so, he was the fellow-servant of plaintiff. In the case at bar, Burns did what he did under the direction of the plaintiff. He could not have compelled the plaintiff to go on the scaffold. Under no view of the case can he be regarded as representing the defendant in fixing the small staging. *Butler* v. *Townsend*, 126 N. Y. 111; *O'Connor* v. *Neal*, 153 Mass. 281; *Killea* v. *Faxon*, 125 id. 485. If the plaintiff was lent or hired out by defendant to Caulfield, surely the defendant is not liable for the negligence of Caulfield's servant. *Donovan* v. *Syndicate*, L. R. (1893) Q. B. 629; *Johnson* v. *Lindsay*, *supra*; *Delaware, L. & W. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Rourke* v. *White Moss Colliery Co.*, L. R. 2 C. P. Div. 206. The payment of plaintiff's wages by defendant is not conclusive, nor is the fact that defendant charged Caulfield an increased price for the services. *Rourke* v. *White Moss Colliery Co.*, *supra*; *Murray* v. *Currie*, L. R. 6 C. P. 24; *Johnson* v. *Boston*, 118 Mass. 114; *The Harold*, 21 Fed. Rep. 428. The court below rested its decision upon the theory that the staging was an instrumentality which the defendant was bound at all hazards and at all times to see was safe. This was error. *Butler* v. *Townsend*, *supra*; *Hogan* v. *Smith*, 125 N. Y. 774; *McCampbell* v. *Cunard S. S. Co.*, 144 id. 552; *Kimmer* v. *Weber*, 151 id. 417; *Adasken* v. *Gilbert*, 165 Mass. 443.

Timothy E. Steele, for the appellee (plaintiff).

It is the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, and reasonably safe appliances and instrumentalities for his work. Wood's Master & Servant, §§ 329, 398; Thompson on Neg. 736. Such duty is a personal duty, the performance of which may be delegated, but the responsibility concerning it remains with the master. *McElligott* v. *Randolph*, 61 Conn. 157, 161; *Wilson* v. *Linen Co.*, 50 id.

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433, 457; *Gerrish* v. *New Haven Ice Co.*, 63 id. 9, 16; *O'Keefe* v. *Box Co.*, 66 id. 38, 45. Agents who are charged with the supplying of safe machinery are not fellow-servants with those engaged in operating it. *Wilson* v. *Linen Co.*, *supra*; *Railroad* v. *Fort*, 17 Wall. 553; *Mann* v. *Mill Co.*, 11 R. I. 152. If the master entrusts this duty to a servant, he makes him to that extent a vice-principal, and not a fellow-servant with the other servants. Tiffany's Persons & Dom. Rel. 492; *Gerrish* v. *New Haven Ice Co.*, 63 Conn. 9; *Sullivan* v. *Railroad Co.*, 62 id. 209. The defendant relies largely in support of his contention upon the cases of *Devlin* v. *Smith*, 89 N. Y. 470, and *Butler* v. *Townsend*, 126 id. 107. These cases, while more or less similar in their facts to the case at bar, were decided upon grounds entirely inconsistent with our Connecticut rules and decisions, and are of little force here.

TORRANCE, J. The decisive question in this case is whether, upon the facts found, it was the duty of the defendant to provide the staging upon which the plaintiff was to do his work in the church building. If it was, there is no error; if it was not, there is. In the discussion of this question it will be assumed that the plaintiff, while doing the work in the church, was and remained, as the finding shows, the servant of the defendant; and further, that the staging furnished to the plaintiff was, as claimed by him, a "place" for the servant to work in, rather than a mere tool or appliance, within the meaning of the rule hereinafter referred to.

The general rule requiring the master to use reasonable care to provide a reasonably safe place for the servant to work in, and performance of that requirement as the full measure of his duty in this respect, is well settled in this State. *Wilson* v. *Willimantic Linen Co.*, 50 Conn. 433; *McElligott* v. *Randolph*, 61 id. 157. This was the rule applied in this case in the trial court, and the important question is whether it was applicable under the facts found.

The first part of the rule above referred to, is usually stated as follows: "It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe

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place in which to work." *McElligott* v. *Randolph*, 61 Conn. 157, 161. This, as a general statement of the general rule applicable in most of the cases of this kind, is accurate enough. It is sufficiently accurate as applied to cases like the two hereinbefore cited from our own reports. As thus stated, however, the duty, and the liability arising from a negligent failure to perform it, would appear to rest upon the master at all times and under all circumstances, whenever and wherever his servants may be at work for him; but this clearly is not so. There are cases where the servant may be at work for the master, and yet no such duty or liability rests upon the master. In cases where the servant does his work upon staging, scaffolding, or similar structures, it frequently happens that it is the duty of the servant, by force of his employment, to make such structure reasonably safe for his own use. In such cases the general rule does not apply in favor of such servant. Shearman & Redfield on Neg. (5th ed.) § 195, and cases cited; *McGorty* v. *Southern New Eng. Tel. Co.*, 69 Conn. 635.

Then, again, this general rule is not ordinarily applicable to cases where the master neither has nor assumes possession, use, or control, legal or actual, of the premises or "place" where the servant may be at work. The general rule is based upon such possession, use and control by the master of the premises where he puts his servants at work for him; and, speaking generally, his duty to use due care to make and keep such place reasonably safe flows from and is measured by such possession, use and control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide reasonably safe premises is founded essentially upon his occupation, use and control of such premises. This being the reason of the rule, when the reason does not exist the rule is inapplicable.

If an employer sends his servant to a distant place by rail, to do a piece of work on the premises of B, it would hardly be contended, in the absence of a special agreement to that effect, that the master would be responsible to the servant

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for the negligence of the transportation company in failing to carry the servant safely, or for the negligence of B in failing to keep his premises in a reasonably safe condition. In the case supposed, the servant, both while being carried and while at work on B's premises, is at work for his master, and the railroad car and the premises of B are places where he is directed to and does perform work for his master; and yet the master, as master merely, would be under no duty to use reasonable care to make such places reasonably safe. The law in such cases reads no such duty into the contract of hiring.

If the master assumes possession and control of the premises of B with his consent, even temporarily, for the purpose of doing the work there, the result might be different. Such a case might be, under certain circumstances, within the reason of the rule. Ordinarily, however, we think the law reads such a duty on the part of the master towards the servant into the contract of hiring, only with reference to premises used, occupied or controlled by the master. If this were not so the duty and liability of the master would be very burdensome. He would be, in effect, frequently made responsible for the negligence of third parties with reference to premises he had never seen, and about the condition of which he knew and perhaps could know nothing. The merchant would, in effect, be liable to his clerk for the negligence of the customer with respect to the safety of the premises upon which the clerk goes to deliver his master's goods, and the master-plumber or carpenter to his workman for the negligence of the householder upon whose premises he sends the workman simply to make some slight repairs. In all such cases the servant, if injured without fault on his part, by the negligent failure of the owner or occupier of the premises to keep them in a reasonably safe condition, has his remedy against such owner or occupier and, in the absence of some agreement to that effect, has none against the master.

We think the case at bar, upon a proper construction of the finding, falls within this class of cases. Unless it was

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the duty of the defendant to furnish the staging in question, the judgment in this case cannot be supported. Such a duty could rest upon the defendant only upon two grounds: (1) because it had specially assumed it in this case; or (2) because the law imposed it upon the defendant as master. We think the facts found fail to show either that the defendant specially assumed, or that the law imposed, any such duty.

If the defendant specially assumed any such duty, that was a fact to be found by the trial court, either expressly or by necessary implication. It is not found expressly, nor by necessary implication. The question, on this part of the case, is, whether if no such duty rested upon the defendant by law, the facts found warrant the conclusion, as matter of law, that it assumed such a duty. The strongest thing in the finding in favor of such a conclusion is the fact that the defendant assured the plaintiff that the staging would be entirely safe; but this fact, taken either alone or with the other facts found, clearly does not warrant any such conclusion as matter of law. The assurance was given at the very time that the defendant told the plaintiff about the strong staging that had been already erected and in use in the building, and at the very time when plaintiff was informed that Caulfield and not the defendant was to "see" to the staging. What the defendant said to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants. The most that can be said about the finding upon this point is that it contains evidential facts tending to prove such an agreement; but such facts do not, as matter of law, constitute such an agreement. Taking the finding as a whole, it is quite clear that it does not show that the defendant specially assumed the duty in question. In justice to the trial court we ought to say that its decision is not based upon the ground that the defendant specially assumed any such duty, but upon the ground that such duty was imposed by law upon the defendant as master under the circumstances; and the remaining question is whether this is so.

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The facts clearly show that Caulfield was before and at the time the plaintiff went to work in the building, in the exclusive occupation and control of the building, premises, and staging, and so remained till after the plaintiff's injury. The building was in New Britain; the defendant's place of business was in Hartford, where plaintiff worked for the defendant. The agreement between the defendant and Caulfield was, in effect, that the defendant should furnish a skilled workman to place the ornament, and Caulfield would furnish staging and all else. The plaintiff was not informed of the details of this agreement, but this is of no importance on this part of the case. It was important as evidence bearing upon the question whether the defendant specially assumed the duty to furnish staging, but not upon the question whether the law imposed the duty upon the defendant as master. The defendant sent the plaintiff from Hartford to this church building in New Britain, to perform this work. The defendant had never been in possession or control of the premises, even temporarily, up to the time the plaintiff went there. It never was, upon the facts found, in possession or control of these premises at all, in any such sense as to make it responsible to its servant for their safety. The case then, as disclosed by the record, is simply the ordinary one where a master, without more, sends his servant to work upon the premises of B at B's request. In such case, in the absence of agreement to that effect, the law does not impose on the master the duty of caring for the safety of the servant upon B's premises.

There is error in the judgment complained of and the cause is remanded for the assessment of nominal damages.

In this opinion the other judges concurred, except ANDREWS, C. J., who dissented.

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CHARLES C. JONES *vs.* THE TOWN OF MARLBOROUGH.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A *quantum meruit* recovery for work and labor performed under a special contract not strictly complied with, is only permitted where the plaintiff was not in willful default, and the defendant has availed himself of the benefit of the services under circumstances sufficient to raise an implied promise to pay for their reasonable value.

There can be no such implication in the case of ordinary repairs of a highway, made under contract with a town by one who receives an annual salary therefor, the payment for which is expressly made dependent upon the acceptance of the work by the highway inspector, when such acceptance is rightly refused.

[Argued May 5th—decided June 1st, 1898.]

ACTION to recover for work and labor in repairing certain highways of the defendant town, brought originally before a justice of the peace and thence by the defendant's appeal to the Court of Common Pleas in Hartford County and tried to the court, *Peck, J.;* facts found and judgment rendered for the plaintiff for $15, and appeal by the defendant for alleged errors in the rulings of the court. *Error and judgment reversed.*

The first count was for $22.50 due in 1897 on a contract made October 14th, 1893, to maintain and repair certain sections of the defendant's highways for five years, for $45 a year. A special defense was pleaded that the work done during the first half of 1897 had not been approved by the inspector provided for in the contract. On this count the defendant had judgment.

The second count was for the reasonable value of services rendered at the defendant's request in maintaining and repairing said sections of its highways, between May 10th and September 1st, 1897. To this a general denial was pleaded.

The finding stated the following facts: On October 14th, 1893, at its annual town meeting, the defendant voted, under General Statutes, § 2665, to let out the repairs and mainte-

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nance of certain sections of its highways for five years to the lowest bidder at public sale, the work to be done according to certain written specifications, and the contractors to execute a bond for the faithful discharge of their contracts. The roads were to be inspected by the highway inspector, on May 10th and September 10th, annually, and he was immediately to notify each contractor whose work was not accepted. The contractors were to make their report of the inspections to the selectmen on or before May 20th and September 20th, in each year, "or forfeit their pay for their services."

The plaintiff was the lowest bidder for the sections mentioned in his complaint, and was awarded the contract, pursuant to the vote. He gave a bond, on the same day, conditioned that whereas he had contracted with the town to repair and maintain said sections for five years from October 14th, 1893, for $45 yearly, in accordance with said specifications, "and to the acceptance of the highway inspector appointed by said town, and known by said name, and no payment to be made for the same until accepted by said inspector: Now, therefore, if the said Jones shall well and truly cause said sections of highway to be repaired and maintained in accordance with said specifications, and to the acceptance of said inspector, then this bond or obligation shall be void, otherwise to be and remain in full force and virtue."

For many years a practical construction had been given to the requirements of the contracts for road repair by the inspectors, selectmen, contractors, and all others concerned in their performance, by which the contractors were not required to keep the roads at all times up to the specifications, but simply to bring them up to that standard at the times set for inspection, and between such inspection times to repair any washouts caused by heavy storms. This practical construction continued to be given to the contract during the period in question, and was treated as the construction to be given to it by both parties on the trial.

The plaintiff performed his contract to the satisfaction of the defendant, and received his pay therefor semi-annually,

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to and including the payment of October, 1896; he also received the payment of October, 1897, leaving the payment which regularly should have been made in June, 1897, in dispute, and this action was brought to recover that payment.

Just prior to the inspection day, May 10th, 1897, the plaintiff and other members of his family were sick, and one of his family died. For this reason the road inspector and selectmen agreed to extend the plaintiff's time for getting his roads ready for inspection, and the first selectman notified him thereof on May 15th, and asked him to get his roads ready as soon as he could. The plaintiff had already done one day's work in preparation for the May inspection, with a man and team, in April; on the 17th, 18th, and 19th of May he employed two men with a team in work on his sections of road. He then notified one of the selectmen that the roads were ready for inspection. The inspector knew on the 20th that the roads had been prepared for inspection. The inspector did not make any formal inspection of the road for report to the selectmen, though he did drive over the roads in the course of other business, and regarded them as insufficient, which fact he stated to the plaintiff in conversation on the 21st.

On June 15th the plaintiff applied to the selectmen for his semi-annual payment, and they refused it because his roads had not been inspected. The selectmen then notified the inspector in writing to inspect the plaintiff's roads, adding to their notice the words, "And you must consider rains that have been since the inspection." The inspector refused to inspect the roads because of this instruction, which he considered improper. The plaintiff knew of this order, and worked a day on the roads with a man and a team on the 19th.

On June 25th the selectmen notified the inspector that the time for inspection of the plaintiff's roads had been extended to July 14th. On June 29th the inspector called on the plaintiff, and told him that his roads were defective in certain respects which he pointed out, and offered to help him for a day without charge, but Jones did not accept his offer. He inspected the roads on July 14th, and reported to the

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selectmen that they were not repaired in accordance with the specifications, and were therefore not accepted. He did not notify Jones of this non-acceptance. On July 10th the plaintiff did more work on the roads. There were heavy rains in May, June and July, which washed the roads badly, and destroyed the work of repair which had been done, and for him to have repeatedly got his roads ready for inspection under the specifications would have exceeded the requirements of his contract.

The inspector should have inspected the roads of the plaintiff after the repair work that was done on May 17th, 18th and 19th; and if he did not accept said work should have notified the plaintiff thereof, and reported the same to the selectmen. At said time the roads of the plaintiff were not entirely in accordance with the requirements of the town vote, and they would not have been approved by the inspector if he had inspected them. The plaintiff in good faith attempted to comply with the requirements of his contract, and believed that he had done so. He also repaired the washouts caused by the heavy rains between May 20th and July 14th. The work done by him prior to May 20th was reasonably worth $15, and was of that value to the defendant, taking the contract price as the standard of comparison.

Upon the above facts the defendant claimed that the plaintiff, by the general rules of law, and by virtue of the provision in the bond, that "no payment shall be made until accepted by the inspector," could recover nothing without a full performance of his contract, and acceptance thereof by the inspector; but the court overruled said claim and held that the plaintiff was entitled to recover $15 under the count claiming a *quantum meruit*.

Percy S. Bryant and *Hugh M. Alcorn*, for the appellant (defendant).

Having contracted for a specified price to do a certain work to the acceptance of an inspector, and having failed to do so, can the plaintiff recover on a *quantum meruit* for the work actually done? The question in this form is answered

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in *Zaleski* v. *Clark*, 44 Conn. 223; *McCarren* v. *McNulty*, 7 Gray, 141; *Brown* v. *Foster*, 113 Mass. 136. When the parties to an express contract specifically agree that there shall be no payment until the entire contract is performed, they are bound by their undertaking, and it is not the province of the courts to make and enforce a new contract differing from the one they themselves have made. Clark on Cont. 782; *Cutter* v. *Powell*, 6 Term Rep. 320; 2 Sm. Lead. Cases (9th Am. ed.), 1212; 3 Amer. & Eng. Ency. of Law, 916, and note; *Leonard* v. *Dyer*, 26 Conn. 172, 176. All the cases which seem an exception to this rule are those in which the defendant has accepted and retained the benefit of the part performance, and in which it would be so inequitable and unjust to allow him to retain and enjoy the benefits conferred without paying for them, that the law implies a promise to do so. 2 Greenl. on Ev. (Lewis's ed.) 152; Clark on Cont. 780, *et seq.*; *Pinches* v. *Swedish Lutheran Church*, 55 Conn. 183. If, from the nature of the case, the benefit conferred cannot be returned, and the recipient was without fault or neglect in receiving such benefit, there can be no recovery for such part performance. Clark on Cont. 783; *Smith* v. *Brady*, 17 N. Y. 173, 187; *Cutter* v. *Powell*, 2 Sm. Lead. Cases (9th Am. ed.), 1226. The case at bar does not come within the exception to the general rule relating to entire contracts, because the defendant did not accept the part performance, nor did it avail itself of benefit from work performed by the plaintiff under any circumstances from which could be implied a promise to pay for the same.

Edward M. Day, for the appellee (plaintiff).

A strict compliance with the provisions of the contract is not a condition precedent to a recovery. *Pinches* v. *Swedish Lutheran Church*, 55 Conn. 183, 185; *Kelly* v. *Bradford*, 33 Vt. 35, 38; *Hayward* v. *Leonard*, 7 Pick. 181; *Smith* v. *First Cong. Meeting-House*, 8 id. 178; *Olmstead* v. *Beale*, 19 id. 528; *Snow* v. *Ware*, 13 Utah, 42; *Lord* v. *Wheeler*, 1 Gray, 282; *Taft* v. *Montague*, 14 Mass. 282; *Moulton* v. *McOwen*, 103 id. 591. The defendant has constantly made use of the

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work performed by the plaintiff, and a rescission of the contract work could not leave the parties in *statu quo*. It would result in an inequitable advantage to the defendant. The plaintiff is entitled to recover of the defendant to the extent of the benefit conferred upon the latter.

BALDWIN, J. It was a material allegation of the second count that the plaintiff's services were rendered at the defendant's request. The only proof of such a request, or of circumstances from which it could be implied, was the town vote and the arrangement which the parties entered into, under its provisions. No written contract was executed between the parties, except a bond, but that recited the fact that the plaintiff had, on the day of its date, which was also that of the town vote, contracted with the town to repair and maintain certain specified sections of its highways, in accordance with the specifications in the vote, and to the acceptance of the highway inspector, for five years from that day, for an annual compensation of $45, no payment to be made until the inspector had accepted the work.

The finding shows that the services in question were rendered under the contract recited in the bond; that the work done was not in accordance with the specifications; that the highway inspector, on May 20th, the day after it was completed, without making any formal inspection for report to the selectmen, drove over the roads, and regarded them as insufficient; that he told this to the plaintiff on the following day; and that if he had made a formal inspection, he would not have accepted them.

The fact that the plaintiff acted in good faith and believed that he had done all that the specifications required, is immaterial. The contract required a more satisfactory test of its fulfillment,—the report of the inspector; and until that had been made in his favor, he was entitled to nothing. Such an inspection of a country road need not be made with any formality. Driving over it, in the course of other business may be sufficient, and in this case undoubtedly was, since the finding supports the result to which the inspector arrived.

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The selectmen, having received no report of the inspection, subsequently extended the time for it, until July 14th, on which day a formal inspection was made, and an unfavorable report returned. Heavy rains had occurred since May 20th, which had destroyed the work of repair done before that day. This was the plaintiff's misfortune, but did not enlarge the liabilities of the town. The roads had already been once sufficiently inspected on May 20th, and the plaintiff notified of the result. He was not injured by the omission of the inspector to make out any formal report at that time, for none could have been made that would have been of any assistance to him.

Nor can the action be supported by the omission of the inspector to notify the plaintiff of the result of the later inspection. The town vote throws on the contractors the duty of obtaining and returning the inspector's report, and unless a favorable report is thus returned, they are to "forfeit their pay for their services." It was therefore for the plaintiff to apply to the inspector for his report; and, had he done so, he would have learned that it had been already returned, and was one of disapproval.

The pay stipulated was in the nature of an annual salary. It was not measured by the services that might be in fact required. In favorable seasons, the value of these might be much less than $45; while a single heavy storm, shortly before the inspection day, might call for such repairs as would subject the contractor to heavy loss. The plaintiff took his chances and must abide the result.

The trial court applied in his favor the doctrine that in certain cases there may be a recovery for the value of labor and materials furnished under a special contract, not strictly performed, where the defendant has availed himself of and been benefited by them, and the plaintiff was not in wilful default. *Pinches* v. *Swedish Evangelical Lutheran Church*, 55 Conn. 183. This is not allowed in every instance where the part performance has been beneficial. It must also be shown that the benefit has been appropriated under circumstances sufficient to raise an implied promise to pay for the

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reasonable value of what has been received, notwithstanding the breach of contract. 2 Smith's Leading Cases (9th ed), 1126, note to *Cutter* v. *Powell.*

Towns do not own their roads, nor use them. The public use them, and towns are benefited by their repair only so far as they may be thus relieved of a statutory responsibility for their proper maintenance. It may be that a promise to pay the value of permanent improvements, such as a stone pavement or a new bridge, furnished under a contract, though not in full accordance with it, would, under some circumstances, if they were retained as part of a highway, be implied by law; but in the case of ordinary repairs, made by one receiving an annual salary, the payment of which is made dependent on the favorable report of an inspector, no such obligation can arise. The town was not exonerated from liability under the statute unless its roads were in fact kept in good condition, and, as respects those to whom it entrusted the fulfillment of this duty in its behalf, it had the right to contract for making the certificate of inspection the sole criterion of what that condition was.

There is error, and the judgment is reversed.

In this opinion the other judges concurred.

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STATE OF CONNECTICUT *vs.* THE TRAVELERS INSURANCE COMPANY.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

No provision of the Federal or State Constitution forbids our legislature from passing laws, the effect of which is to tax the shares of stock of Connecticut corporations owned by aliens at a higher rate than like shares owned by resident stockholders.

The question whether such alleged discriminatory legislation is void as against citizens of other States, under Art. 4, § 2, of the Constitution of the United States which provides that the citizens of each

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State shall be entitled to all privileges and immunities of citizens in the several States, will not be considered, unless it appears from the record that the non-resident stockholders, in whose behalf such claim is made, are citizens of other States.

The declaration in the 14th amendment to the Federal Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws, applies only to those persons who are physically present within the territorial jurisdiction of the State, the protection of whose laws they invoke.

A State has the right to debar aliens from holding stock in its corporations, or to admit them to that privilege upon such terms as it may prescribe; for the right of corporate association under the protection of an artificial personality, and of doing business on its credit, is a franchise granted by the State to such, and such only, as she may deem fit to be entrusted with its exercise.

Chapter 153, § 2, of the Public Acts of 1897, requiring certain corporations to pay to the State an annual tax of one and one half per cent upon the market value of their stock owned by non-residents, although in form a tax against the corporation, is in substance a tax against each of its non-resident stockholders.

The Act of 1897 increased the tax upon the stock held by non-residents from one to one and one half per cent of its value, but made no change in § 3917 of the General Statutes which gave the corporation paying the tax a lien upon the stock of each non-resident stockholder to the extent of one per cent of its value. *Held* that the defendant was not thereby deprived of its property without due process of law, inasmuch as General Statutes, § 1923, gave it a lien at all times upon all stock owned by any one of its stockholders, for all debts due to it from him. *Held*, also, that every non-resident stockholder who became such after the passage of the Act of 1897, or continued to hold his stock thereafter until the tax day in October, might fairly be deemed to have assented to any payment which the corporation could be legally compelled to make in his behalf, and so to have come under a contractual obligation to repay the moneys so advanced.

The sovereign power which creates a corporation can give its capital stock a *situs* within the State for purposes of taxation; and this is accomplished by a law taxing and imposing a lien upon the shares there.

The Act of 1897 applies to shares of "stock liable to taxation and not otherwise taxed." *Held* that a tax upon the property of the defendant which gave these shares their value, was not the same thing as a tax upon the shares of stock owned by non-residents.

General Statutes, § 3930, provides that the valuation affixed by the corporation to the stock of non-residents shall be revised by the state board of equalization, whose valuation "shall be final." *Held* that this did not preclude the courts, in a suit to recover the tax, from

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correcting any errors in the mathematical process by which such valuation was reached.

[Argued May 5th—decided June 1st, 1898.]

ACTION to recover the balance of a tax upon the shares of non-resident stockholders of the defendant company, brought to the Superior Court in Hartford County and tried to the court, *Shumway, J.*, upon the defendant's demurrer to the complaint; the court overruled the demurrer and thereafter rendered judgment (*Ralph Wheeler, J.*) for the plaintiff, and the defendant appealed for alleged errors in the rulings of the court. *No error.*

The complaint set forth as an exhibit the statement returned to the comptroller on October 1st, 1897, by the secretary of the defendant, of its non-resident stockholders and the number and market value of the shares held by each, as corrected by the board of equalization, which showed that there were 2,083 such shares, worth $220 a share; and alleged that the defendant had paid $1,468.51 of the tax due the State under § 2, Chap. 153 of the Public Acts of 1897, and no more.

The statement returned contained a list "of the stockholders of the Travelers Insurance Company, residing without this State," and gave the name of each, but not the place of residence of any.* It also set forth that the defendant had invested in real estate upon which it is assessed and pays a tax, the sum of $1,886,485.54, and added: "In order that taxation of all the shares of the same corporation may be approximately uniform and equal, and based upon an equal valuation of all its shares, and to avoid double taxation, it is claimed that the stockholders whose names are returned on this sheet should have the benefit of the same deduction made in favor of shareholders who reside in Con-

* The fact that the record failed to show that any of the non-resident stockholders were citizens of the United States or of any one of them, was called to the attention of counsel during the argument, and the attorney for the State, upon inquiry by the court, declined to waive this omission, or to concede that the rights of citizens of other States were in issue under the pleadings.

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necticut." This deduction was then stated to be $183.45 from a market value of $230, leaving the "taxable value of stock per share, $46.55;" this result being ascertained by the proportion: $2,365,161.39 (the net surplus assets of the company on July 1, 1897) : $1,886,485.54 :: $230 : x = $183.45.

The demurrer to the complaint, which was overruled, set up that the Act of 1897 was void, under Art. IV of the United States Constitution and the XIVth amendment thereto, and as contrary to the principles of natural justice; that the tax was on personal property outside of the territory and jurisdiction of this State; and that it was a tax upon property of the defendant which was otherwise taxed.

The answer contained two defenses. The first set forth the statement returned to the comptroller, and alleged that the $1,468.51 which had been paid was the full amount payable under the provisions of the statute. The second defense was as follows: "The capital stock of the defendant company is represented by ten thousand shares, and, on the 1st day of October, 1897, 7,917 shares were owned by resident shareholders and 2,083 by non-resident shareholders. The defendant company, on the 1st day of October, 1897, had investments in real estate amounting to $1,886,485.54, to wit: $57,965.81 invested in real estate situated in this State, and $1,828,519.73 invested in real estate situated in other States, upon all of which real estate the defendant company is assessed and pays taxes. Said real estate constitutes the entire value of said capital stock in excess of $46.55 per share. Said board of equalization, in correcting the defendant's return and valuations, made no allowance, deduction, or diminution of the share value for or on account of said real estate, or any part thereof. The taxable value of said stock, as found by the board of equalization, is largely in excess of the taxable value of said stock owned by resident shareholders, and the amount of tax thereby required to be paid by said non-resident shareholders is larger than that required to be paid by the resident shareholders aforesaid."

The reasons of demurrer to the first defense were that it contained no denial of the complaint and nothing material

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in avoidance; that the valuation of the shares of stock by the board of equalization was final; and that upon that basis the total taxes payable by the defendant were $6,873.90, thus leaving a large balance still due.

The reasons of demurrer to the second defense were substantially the same, and also that it was not the duty of the board of equalization to make any deduction for the value of the plaintiff's taxable real estate, whether in or out of Connecticut; that no tax is required by law to be paid by the defendant on account of its stock owned by Connecticut shareholders; that the board of equalization is not required to make and is not alleged to have made any finding as to the taxable value of the stock of the defendant; that the value for taxation of the stock of Connecticut shareholders is fixed by the assessors of the towns in which such shareholders reside, and it does not appear at what value such stock is so assessed, and is immaterial if it be assessed at less than the market value as found by the board of equalization; that the taxes of Connecticut shareholders depend on the votes of the municipalities in which they may respectively reside, and it does not appear to what rates of taxation they are thus subject, and would be immaterial, did it appear; and that no tax is by law required to be paid by non-resident shareholders.

This demurrer having been sustained, and no further plea or answer being filed, judgment was rendered for the State to recover $5,556.74 damages, that being the balance of the tax assessed ($6,873.90), after making due credit for the payment made.

Henry C. Robinson and *William R. Matson*, for the appellant (defendant).

The Act under which the tax is imposed is in violation of Art. IV, § 2, of the U. S. Constitution, and of the 14th amendment thereto, in that it is discriminating, unequal and unjust, and withholds from the valuation of shares of non-residents the exemptions given by statute to the valuation of the same stock belonging to residents. The non-resident

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shareholders are entitled to protection under both of these constitutional provisions. The scope of the term "privileges and immunities," as used in Art. IV, § 2, of the Constitution, clearly intends that citizens of each State are to be placed upon the same footing with citizens of other States so far as the advantages resulting from citizenship in those States are concerned. *Paul* v. *Virginia*, 8 Wall. 168; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Hooper* v. *California*, 155 U. S. 648; *Ward* v. *Maryland*, 12 Wall. 418; *Van Valkenburg* v. *Brown*, 43 Cal. 48; *Sprague* v. *Fletcher*, 69 Vt. 69; *Bliss's Petition*, 63 N. H. 135; *Wiley* v. *Parmer*, 13 Ala. 627; *State* v. *Ins. Com'rs*, 37 Fla. 564. The fourteenth amendment, while primarily intended for the benefit of the African race, has become a sort of new Magna Charta for all United States citizens. It cannot be doubted that the result of the 14th amendment is to limit the sovereign rights of States, wherever those sovereign rights conflict with the amendment. *Plessy* v. *Ferguson*, 163 U. S. 527; *San Mateo* v. *So. Pac. Ry.*, 13 Fed. Rep. 722; *Santa Clara* v. *So. Pac. Ry.*, 118 U. S. 394; *Fraser* v. *McConway, etc., Co.*, 82 Fed. Rep. 257; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Neal* v. *Delaware*, 103 id. 370; *Railroad, etc., Co.* v. *Equalizers*, 85 Fed. Rep. 302; *Barbier* v. *Connolly*, 113 U. S. 27; *Fire Asso.* v. *New York*, 119 id. 110. Another effect of the growth of these doctrines regarding the fourteenth amendment, is to read into the Constitution of this State a provision that taxation shall be uniform and equal. *Bell's Gap R. Co.* v. *Penn.*, 134 U. S. 239; *San Mateo* v. *So. Pac. R. Co.*, 13 Fed. Rep. 722, 734. The State of Connecticut, in classifying shareholders for purposes of taxation, is as strictly bound by the terms of the 14th amendment as in the case of discriminations. *Railroad Tax Cases*, 13 Fed. Rep. 722; *Gulf, etc., Co.* v. *Ellis*, 165 U. S. 150; *Railroad, etc., Co.* v. *Board*, 85 Fed. Rep. 307; *Railway Co.* v. *Guenther*, 19 id. 398. As a citizen of the United States, a non-resident stockholder would have absolute constitutional rights which the State could not override. *U. S.* v. *Cruikshank*, 92 U. S. 542; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701; *People* v. *Weaver*, 100 id. 537. The State cannot im-

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pose the burden of taxation on a few only and exempt others; it cannot tax one person at one rate and his neighbor at another and lower rate; nor designate one class of persons as special objects of taxation, without violating the constitutional provision as to equality. *Nat. Bank* v. *Kimball*, 103 U. S. 732; *Davenport* v. *Chicago, etc., Co.*, 38 Ia. 633; *Cooper* v. *Ash*, 76 Ill. 11; *Dubuque* v. *C., etc., Co.*, 47 Ia. 208; *Railroad, etc., Co.* v. *Board*, 82 Fed. Rep. 302. The law of 1897, by repealing the old law, has deprived the company, upon whom the statute imposes the duty of making the primary payment, of the lien which it had by the old law upon the dividend and stock of the non-resident shareholders whose property is really attempted to be taxed by the law. Such a law is offensive, not only to the United States constitutional provisions which we are now discussing, but to the principles of natural justice, which underlie our own and Federal Constitution as well. The attempt of the statute to impose a tax on the share of non-residents is an attempt to tax personalty outside of the jurisdiction of the State, and is void. *Kirtland* v. *Hotchkiss*, 42 Conn. 426; *State Tax on Foreign-held Bonds*, 15 Wall. 300–326; *People* v. *Campbell*, 138 N. Y. 543; *Murray* v. *Charleston*, 96 U. S. 432. Stock is personal property. It follows the person of its owner, has its *situs* at his domicil, and can only be taxed elsewhere when the law creating the corporation expressly gives the stock a different *situs*. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490; *Baltimore* v. *Hussey*, 67 Md. 112; *Watson* v. *Fairmount*, 38 W. Va. 183; *Bradley* v. *Bauden*, 36 Ohio St. 28; *Lee* v. *Dawson*, 8 Ohio Cir. Ct. 365; *Bank* v. *Kentucky*, 9 Wall. 353; *People* v. *Commissioners*, 23 N. Y. 224. The claim of the plaintiff demands a tax upon property of the defendant, which is "otherwise taxed" within the meaning of the statutes of the State. Double taxation is contrary to the policy of the State of Connecticut. *Lockwood* v. *Weston*, 61 Conn. 211; *Kirtland* v. *Hotchkiss*, 42 id. 426; *Security Co.* v. *Hartford*, 61 id. 89, 101; *Osborn* v. *New York & N. H. R. Co.*, 40 id. 491, 494; *Toll Bridge* v. *Osborn*, 35 id. 7, 20.

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Edward D. Robbins, for the appellee (plaintiff).

The action of the board of equalization is final. *State* v. *N. Y., etc., R. Co.*, 60 Conn. 326, 337; *Coite* v. *Conn. Mut. Life Ins. Co.*, 36 id. 512, 535. The second ground of defendant's demurrer to the complaint involves the claim of law that a State cannot in any way tax stock in its own corporations held by non-residents. In support of this claim defendant's counsel rely on a class of cases following the leading case of *State Tax on Foreign-held Bonds*, 15 Wall. 300. In that case it was held that a *debt* was not property where the debtor resides, but rather where the creditor resides. But the difference between a *debt* of a domestic corporation and a share of its *stock* is radical. *In re Bronson*, 150 N. Y. 1; *People* v. *Campbell*, 138 id. 543. But technical considerations about the *situs* of property have very little weight in determining the *validity* of a tax law. *Adams Ex. Co.* v. *Ohio*, 166 U. S. 185; *Tappan* v. *Merchants' Nat. Bk.*, 19 Wall. 490; *National Bank* v. *Com.*, 9 id. 353; *Merchants, etc., Bank* v. *Pennsylvania*, 167 U. S. 461. The State which created this corporation may require it to pay any reasonable taxes, and has the right to exercise full discretion in formulating a rule by which the amount to be paid shall be ascertained. *People* v. *Equitable Trust Company*, 96 N. Y. 388, 395; *People* v. *Ins. Co.*, 92 id. 328; *McCullock* v. *Maryland*, 4 Wheat. 316; *Providence Bk.* v. *Billings*, 4 Pet. 514; *Coite* v. *Conn. Mut. Life Ins. Co.*, 36 Conn. 512, 527; *Coite* v. *Society for Savings*, 32 id. 173; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, ibid. 632; *State Tax on Railway Gross Receipts*, 15 id. 284; *Erie Railway Co.* v. *Pennsylvania*, 16 id. 492; *Delaware Railroad Tax*, 18 id. 206; *Philadelphia Contributionship* v. *Com.*, 98 Pa. St. 48; *In re McPherson*, 104 N. Y. 306, 316; *Att'y-General* v. *Bay State Mining Co.*, 99 Mass. 148; *Manufacturers Ins. Co.* v. *Lond*, ibid. 146; *Portland Bank* v. *Apthorp*, 12 id. 252. It is claimed that the statute imposing the tax is unconstitutional. It must be at once admitted that the system of taxation adopted by this State is not absolutely equal and uniform. But no system of taxation ever adopted

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anywhere has attained ideal equality and uniformity. There are all sorts of difficulties encountered by lawmakers which render impracticable any near approach to ideal justice. In reality the shares of non-residents now bear a much lighter weight of taxation than they would practically bear, if the banks or insurance companies were taxed directly on their assessable property, like other corporations, and like individuals generally. Such being our system of taxation, it is submitted that it is not obnoxious to any constitutional prohibition. *Railroad Tax Cases*, 92 U. S. 575; *Adams Ex. Co.* v. *Ohio*, 165 U. S. 194; *Tappan* v. *Merchants' Nat. Bk.*, 19 Wall. 490; *Pacific Ex. Co.* v. *Seibert*, 142 U. S. 339; *Bell Gap R. Co.* v. *Penn.*, 134 id. 232; *Merchants', etc., Bk.* v. *Penn.*, 167 id. 461.

BALDWIN, J. Under the laws of this State, some of its corporations are subjected to taxes which are in lieu of any upon their shareholders, while for others a different rule is prescribed, and the shares are taxable against those who own them. General Statutes, § 3916, required the cashier or secretary of each corporation whose stock is liable to taxation and not otherwise taxed, to deliver, early in October, annually, to the comptroller, a sworn list of all its stockholders residing without this State on the first day of that month, and the number and market value of the shares held by each, and to pay to the State, on or before the twentieth day of the month, one per cent of such value. Section 3917 provides that all such companies "shall have a lien upon the stock of each non-resident stockholder, for the reimbursement of the sums so required to be paid by them, to the extent of one per cent. of the value of his stock as contained in said list."

Returns of a somewhat similar character as to the shares held by residents in Connecticut are to be made to the assessors of the town, city or borough to which they respectively belong. General Statutes, § 3837; Public Acts of 1897, p. 905, Chap. 205.

In 1897, § 3916 was so amended as to raise the percentage

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of the valuation payable to the State from one to one and one half per cent. Public Acts of 1897, p. 857, Chap. 153. By General Statutes, § 3930, the State board of equalization, at a certain time in October, after due opportunity for a hearing of the party making any return under General Statutes, § 3916, is to correct the return and the valuation given therein, if found erroneous, and the valuation as thus corrected is to be "final, and the sums required shall be paid according to it."

Every Connecticut shareholder in each of these corporations is taxable upon his stock by the municipality in which he may reside, at such rates as it may fix from year to year, in view of its financial needs.

The defendant belongs to the class of corporations whose stock is liable to taxation, and the mode of such taxation is prescribed by the statutes to which reference has been made. The shares held by residents are taxable at such rates as the towns, cities and boroughs, to which they belong, may, from time to time, see fit to impose, upon a valuation set by the local assessors. The shares held by non-residents are taxable at the fixed rate of one and a half per cent upon their market value, as determined by the state board of equalization.

It is nowhere stated upon the record that any of the non-resident shareholders in the defendant company are citizens of the United States or of any one of them. Their names only are given, and while we may take judicial notice that these are those of persons belonging to an English speaking race, we cannot assume, as a cause for reversing the judgment rendered by the Superior Court, that they are Americans, any more than that they are Englishmen. The provision of the Constitution of the United States that the citizens of each State shall be entitled to all privileges and immunities of citizens in every other must, therefore, be laid out of the case.

Regarding the shareholders in question simply as so many persons, residing without this State, there can be no ground for claiming that they cannot be charged with the tax in con-

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troversy, by reason of the declaration in the fourteenth amendment to the constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws. This inhibition is only for the benefit of persons who are physically present within the territorial jurisdiction of the State, the protection of whose laws they invoke. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. The same is true of the Act of Congress, U. S. Rev. Stat., § 1977, passed under the authority of the fourteenth amendment, by which it is provided that "all persons within the jurisdiction of the United States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like . . . taxes, licenses, and exactions of every kind, and to no other." The rights thus secured are those only of persons who at the time are within the jurisdiction, that is, within the territory or under the flag, of the United States.

A State has a right to debar aliens (and as has been stated, it does not appear that any Americans are among the non-resident stockholders in the defendant company) from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. The right of association under the protection of an artificial personality, and of doing business on its credit, whether it be obtained by a special charter or under a general incorporation law, is a franchise granted by the State to such, and such only, as she may deem fit to be entrusted with its exercise. Whatever may be the law as to citizens of other States, aliens can be excluded from membership in such bodies, unless they enter them on conditions which subject their investments to such burdens of taxation as the legislature may think it proper to impose. *Mayer* v. *Grima*, 8 How. 490, 494.

The laws of Connecticut for more than thirty years have required the payment into her treasury, annually, of a fixed percentage of the market value of all stock in her insurance corporations held by non-residents. Public Acts of 1866, p. 19, Chap. 29. This rate, from 1866 (which was only three

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years after the grant of its charter to the defendant) to 1897, was one per cent; and during all this period resident stockholders were taxed on their shares, in a very different manner. The statute now in question, by which the percentage was raised to one and a half per cent, was passed on May 13th, 1897, to take effect on July 1st. The tax was to fall on the shares which might be held by non-residents on October 1st. Ample opportunity was thus given to them to sell out their holdings in order to avoid this new burden; and those who remained can stand on no better footing than if they had bought their stock after the passage of the statute and with full knowledge of its terms.

The tax in question is, in form, one against the corporation. *State* v. *Royce*, 68 Conn. 311. In substance it is one against each of its non-resident stockholders, to be paid by it in their behalf. *Batterson* v. *Hartford*, 50 Conn. 558, 560. It is imposed only on corporations "whose stock is liable to taxation and not otherwise taxed." It is measured by the number of shares held by non-residents, and the value of each share. These shares do not belong to the corporation, and a tax on their value is virtually a tax against their owners. *Oliver* v. *Washington Mills*, 11 Allen, 268, 273. Where all the shares in a corporation are massed for purposes of assessment and taxation, this can be regarded as merely a convenient mode of ascertaining the value of its own property. *Nichols* v. *New Haven & Northampton Co.*, 42 Conn. 103, 120. No such construction can be given to a statute which fastens only upon such shares as are held by a particular class of persons. That now in question does no more than make the defendant the paymaster as respects the State. The non-resident shareholders owe the tax, as respects the corporation. The original law of 1866 was therefore careful to provide (§ 2) that every insurance company, paying the tax which it imposed, should "have a lien upon the stock of such non-resident stockholders, for the reimbursement of said sums so required to be paid." In General Statutes, § 3917, a similar lien is given "upon the stock of each non-resident stockholder" with the added words: "to the extent of one per

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cent. of the value of his stock as contained in said list." The list to which reference is thus made is that to be returned under the preceding section, which as now amended makes the sum "required to be paid" one and a half per cent of the value of the stock.

It is strongly urged that to compel the defendant to discharge its shareholders' obligations, and then only give it a lien for two thirds of the moneys that may be thus advanced, is contrary to natural justice, and also in violation of the provisions of the fourteenth amendment to the Constitution of the United States, that no State shall deprive any person of property without due process of law. General Statutes, § 1923, strips this argument of force. That declares that every corporation, when it is not otherwise provided in its charter, "shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him." A tax, in the strict signification of that term, may not constitute a debt to the sovereignty or municipality by which it is imposed. *Lane County* v. *Oregon*, 7 Wall. 71. But by General Statutes, § 3901, "all taxes, properly assessed, shall become a debt due from the person, persons, or corporation, against whom they are respectively assessed, to the city, town, district, or community in whose favor they are assessed, and may be in addition to the other remedies provided by law, recovered by any proper complaint or proceeding at law, in the name of the community in whose favor they are assessed." Those payable to the State are deemed to be collectible in a similar way. *State* v. *New York, N. H. & H. R. Co.*, 60 Conn. 326, 334. By becoming members of the defendant company after the passage of the Act of 1897, or by remaining members subsequent to that event, every non-resident stockholder may fairly be deemed to have assented to any payment which it might be legally compelled to make in his behalf under the provisions of that law, and so to have come under a contractual obligation for the reimbursement of the moneys so advanced. For the full performance of that obligation, the defendant had a lien under General Statutes, § 1923, though its lien under General Statutes, § 3917, would

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be only a partial one. These two sections may well stand together; one giving a better remedy than the other, but both having similar purposes in view.

There is nothing in the objection urged in the demurrer to the complaint, that the law in question "attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State." Each non-resident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a *situs* within its territory for purposes of taxation. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Lockwood* v. *Weston*, 61 Conn. 211, 218. To do this it is not necessary to declare in terms that they shall be deemed to be situated where the corporation belongs. It is enough to lay a tax upon them there, and impose a lien upon them there.

This demurrer also sets up that the tax in suit is one "upon property of the defendant which is otherwise taxed," and so unauthorized by the statute, which applies only to shares of "stock liable to taxation, and not otherwise taxed." This claim, plainly stated, is, not that the shares of stock held by non-residents are otherwise taxed by law, but that the property of the defendant, which gives them their value, is otherwise taxed, in whole or part. As the tax is one upon certain shares held by certain individuals, which are not otherwise taxed, it is immaterial whether the property of the defendant is otherwise taxed or not. Taxing that is not the same thing as taxing its capital stock in the hands of its shareholders.

The pith of the answer to the complaint is, that the board of equalization ought to have allowed the deduction claimed from the market value of the shares on account of the defendant's holdings of taxable real estate. Such a deduction is provided for by General Statutes, § 3836, in favor of every resident shareholder. His shares are to be set in his list in the town in which he resides at their market value, "but so

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much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of its stock, in its returns to the assessors."

If such a deduction ought to have been made by the State board of equalization, the defendant can properly avail itself, in this proceeding, of their omission of that duty. The only question is whether a certain amount, as to which there is no dispute, should have been subtracted from the market value of the stock. The provision of the statute (General Statutes, § 3930), that the "valuation of the . . . estate" made by the board "shall be final," does not preclude the courts, in a suit for the tax, from correcting any errors in the mathematical process by which such valuation was reached. *State* v. *New York, N. H. & H. R. Co.*, 60 Conn. 326, 336.

There is no statute which in terms required or authorized the board to allow the deduction claimed. The returns to the assessors referred to in General Statutes, § 3836, are those required in October, annually, from all corporations "whose stock is liable to taxation," to the assessors of each town in the State in which any of their stockholders may reside, stating their names and the market value of the shares during the preceding month. General Statutes, § 3837. The General Assembly had the right to give this privilege or rebate to our own citizens, and to withhold it from aliens. We do not intimate an opinion as to whether it would constitute an immunity, the benefit of which could be claimed by citizens of other States; for, as has been already stated, their rights are not put in issue by the pleadings. It is sufficient to support the judgment appealed from that, although the reduction by the board of equalization of the market value of the defendant's shares owned by non-residents, from $230 to $220, is slight, as compared with that which resident stockholders are entitled to claim from the local assessors, the favor thus shown to our own citizens is not forbidden by any provision in the Constitution of this State or of the United States, nor inconsistent with any of those maxims of jurisprudence which define the meaning of "legislative

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power" as vested by our Constitution in the legislative department. Every foreign stockholder consented to the inequality, when he elected to continue to participate in the benefits of the defendant's franchise, after the passage of the Act of 1897; and it does not appear that the interests of any but foreigners are involved.

The result which we have reached may practically throw upon the non-resident shareholders in the defendant company the weight of double taxation. Its capital funds have been mainly invested in taxable real estate. To a company differently situated in this respect, the payment of taxes on its real estate might hardly cause an appreciable diminution of the net earnings which would otherwise be applicable to dividends. But taxes seldom bear equally upon all. There is little in the Constitution of this State to limit the discretion of the legislature in imposing them, and nothing which militates against the validity of that now in question.

In view of the issues closed, upon which the judgment of the Superior Court was rendered, we are of opinion that there is no error.

In this opinion the other judges concurred.

WILLIAM C. FIELDING *vs.* SOLOMON SILVERSTEIN. | 70 605 | 71 704

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

Judgment for a return of the property, authorized by statute to be rendered upon the withdrawal of a replevin suit, does not involve any adjudication of the title to such property, nor estop the surety in the replevin bond, when sued thereon, from proving, in mitigation of damages, that his principal in fact owned the property replevied but not returned in compliance with the judgment.

As tending to prove that certain goods attached and replevied were the same goods bought by the plaintiff in replevin from a trustee in insolvency, the defendant offered in evidence a certified copy of the

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inventory of the insolvent estate and one of the several schedules referred to therein. *Held* that the evidence was properly admitted.

[Argued May 6th—decided June 1st, 1898.]

ACTION upon a replevin bond, brought to the Court of Common Pleas for Hartford County and heard in damages to the court, *Case, J.;* facts found and judgment rendered for the plaintiff for nominal damages only, and appeal by him for alleged errors in the rulings of the court. *No error.*

The plaintiff in January, 1897, attached four cases of clothing, by virtue of a writ directing him to attach the goods of one B. Wilenski, in a suit in which A. S. Richardson & Brother were plaintiffs, and said Wilenski was defendant. While said four cases of clothing were in the possession of Fielding by authority of said attachment, they were taken from his custody by virtue of a writ of replevin, brought by one Lemenski, who gave the usual replevin bond together with Silverstein, the defendant in this action, as surety. Richardson & Brother obtained a judgment in the action against Wilenski. After the replevin suit had been returned to court Lemenski, the plaintiff therein, appeared in court and withdrew the action; and judgment was thereupon rendered for the return of said property to the defendant, Fielding, and for the defendant to recover his cost. The costs of suit were paid by Lemenski, but he refused to return the property to Fielding in accordance with said judgment, and this action was thereupon brought against the surety, Silverstein, for breach of said replevin bond.

The answer to the complaint alleged that the four cases of goods replevied were at the time of the attachment the sole property of Lemenski, and that the plaintiff had suffered no actual damage on account of the failure of Lemenski to return the same. To this answer the plaintiff demurred, on the ground that the court in the replevin suit having passed a judgment ordering the goods replevied to be returned to the one from whom they were taken, the defendant had the alternative of obeying or refusing to obey such order; having chosen to disobey, he forfeited his bond and his surety

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cannot attack the judgment by collateral methods. This demurrer was sustained.

The defendant then suffered a default. The court assessed the damages at the sum of one dollar. Upon the hearing in damages the defendant offered evidence to prove, in mitigation of damages, that the title to the goods in question was not in Wilenski at the time of their attachment by Fielding, but that the title, as well as the right to the possession, of said goods was in Lemenski. To the admission of this evidence the plaintiff objected, on the ground that the title to the goods had been settled in the replevin suit; that proof of title in a third party tended to impeach that judgment, and that the judgment of return estopped the defendant from showing a different title in the action on the bond. The court overruled the objection, admitted the evidence, and the plaintiff duly excepted.

As a part of his general line of proof to show Lemenski's title at the time of atttachment in January, 1897, the defendant offered evidence to show that Wilenski, at one time a retail dry goods dealer, made an assignment in insolvency in May, 1896; that the goods in question were turned over to the trustee of his insolvent estate, inventoried and appraised as a part of said estate, and by said trustee conveyed for a valuable consideration by written bill of sale to said Lemenski, on June 17th, 1896. As a part of his chain of proof and for the purpose only of identifying the goods purchased of the trustee with the goods attached, the defendant offered in evidence a duly certified copy of the inventory of the insolvent estate; that evidence was admitted against the plaintiff's objection. The plaintiff also objected to the admission of the evidence, on the ground that the inventory referred to schedules A, B, C, D, E, F, and G, and the certified copy included only schedule E. This schedule E contained a list of overalls, coats and jumpers, of the value of $28.44. The defendant claimed that schedule E contained that part of the identification he considered necessary to the case. The court said: "As a part of your line of proof, I cannot say that it has no bearing. I will admit it for the purpose which you ask."

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To these rulings the plaintiff duly excepted. The other schedules referred to in the inventory were not offered in evidence at any subsequent stage of the case, but evidence was offered in description of the precise contents of the said four cases of clothing, and other evidence was offered by the defendant for the purpose of identifying said contents as a part of the goods conveyed by the trustee in insolvency to Lemenski. It further appeared upon the trial that a part of the goods contained in the said four cases were overalls, coats and jumpers.

The errors assigned in the appeal are: "1. That the evidence of title to the replevied goods was inadmissible, as it tended to impeach the judgment in the replevin suit, and the defendant was estopped from showing a different title, by a judgment of return in said action of replevin. 2. That the inventory in its incomplete and partial form was no proper evidence of the title to the replevied goods, and was inadmissible in the condition presented to the court."

J. Gilbert Calhoun, for the appellant (plaintiff).

Noble E. Pierce and *William H. Leete*, for the appellee (defendant).

HAMERSLEY, J. The trial court properly admitted evidence to prove, in mitigation of damages. that the title to the goods in question was, at the time of their attachment, in Lemenski, the plaintiff in the replevin suit.

The condition of a replevin bond is broken if the plaintiff fails to prosecute his suit to effect; this failure happens when, upon trial, he fails to prove his title; when his writ is abated; when he suffers a nonsuit; when he withdraws his suit; when he neglects to return his writ. In all these cases, unless the last, the court is authorized by statute to render a judgment *de retorno* and for costs. *Persse* v. *Watrous*, 30 Conn. 139, 148. Such judgment is based upon a judicial finding that the plaintiff in replevin has failed to prosecute his suit to effect, and is conclusive upon that fact. In *Orms-*

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bee v. *Davis*, 16 Conn. 567, the defendant in a suit on the replevin bond pleaded, in bar to the action, ownership of the attached property in the plaintiff in the replevin suit; and the court held that the plea was insufficient; that it impliedly admitted the allegations of the declaration that the writ of replevin had been withdrawn by the plaintiff therein and the judgment *de retorno* rendered; and that this judgment was conclusive as to a cause of action in the suit on the bond. But the court says (p. 575) that the judgment could not estop the defendant from proving title in the replevin plaintiff, if such proof were material, unless the title had been put in issue and adjudicated in the former trial; and this is elementary law.

In a suit on a replevin bond the plaintiff must not only prove his cause of action, *i. e.* a breach of the condition to prosecute the replevin suit to effect (and upon this question a judgment *de retorno* is conclusive), but he must also prove his actual damage; if he has not been damnified in fact, he can recover only nominal damages. Upon this question of damage the ownership of the property replevied may be material, and if so, may be proved by the defendant. *Jackson* v. *Emmons*, 59 Conn. 493. The defendant cannot be estopped from producing such evidence by any judgment, unless it be one rendered in an action between the same parties, wherein the fact sought to be proved, *i. e.* the title to the property, was in issue and adjudicated. The judgment for a return of the property authorized by statute to be rendered upon the withdrawal of a replevin suit, cannot involve any adjudication of the title.

The other claim that the court erred in admitting the copy of the inventory of the insolvent estate, is without merit.

There is no error in the judgment of the Court of Common Pleas.

In this opinion the other judges concurred.

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The New York, New Haven and Hartford Railroad Company *vs.* The Fair Haven and Westville Railroad Company.

Third Judicial District, Bridgeport, April Term, 1898. Andrews, C. J., Torrance, Hamersley, Hall and Prentice, Js.

Special damage to the land of an adjoining proprietor, caused by the location and operation of a railroad in the highway, constitutes an appropriation of his property for which compensation must be paid, notwithstanding the location of railroads of a certain character, found by the legislature to promote the ordinary use of a highway, may not be a taking of the land within the highway requiring compensation.

The General Assembly may authorize an electric railway to cross the tracks of a steam railroad at grade in a public highway, without providing for the payment of compensation to the latter for any inconvenience or damage resulting to it therefrom. The grant of such a privilege by the State confers no property right in the soil of the highway upon either railway company.

There is a material distinction between the power of the State to authorize the location and operation of an electric railway upon a turnpike or bridge causeway, and its power to authorize such location and operation upon a statutory, public highway. In the latter case the possessory right, disturbed by the railway, belongs to the State and may be relinquished without compensation; while in the former instance this possessory right constitutes the property of a private corporation and cannot be taken without making just compensation therefor.

The plaintiff, a steam railroad company, had, by condemnation and by deed, acquired the title to a certain parcel of land formerly owned by a toll-bridge company and across which its bridge causeway extended, subject to such legal rights of crossing as then existed. *Held* that the right to cross this strip with an electric railway, subsequently conferred upon the defendant by the legislature, was not excepted by the condemnation proceedings instituted by the plaintiff, and that the operation of an electric railway across this parcel and across the plaintiff's tracks at grade, ought to be enjoined until the defendant had compensated the plaintiff for the injury thereby caused to its property rights. *Held*, also, that the defendant's charter, neither in its original form nor as amended, contemplated the defendant's use of this property without making compensation therefor.

[Argued April 22d—decided June 17th, 1898.]

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SUIT to restrain the operation of an electric railway upon the plaintiff's land, brought to the Superior Court in New Haven County and reserved by that court, *George W. Wheeler, J.*, upon an agreed statement of facts, for the consideration and advice of this court. *Judgment advised for plaintiff.*

The case is sufficiently stated in the opinion.

Henry Stoddard, for the plaintiff.

The case at bar is radically different in its essential features from the case of the *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146. In the present case the defendant is under a contract obligation to remove its tracks. The causeway at the point in question is the property of the plaintiff, and has been devoted to the chartered purposes of the plaintiff, since about 1840, as a means of access to its steamboat wharf, and for switching and freight-yard purposes. These purposes are exclusive in their nature, and are of the essence of the continued discharge and exercise of plaintiff's corporate duties and functions. In addition to this contractual relation there is a special, peculiar and exceptional damage resulting to the plaintiff from the location and operation of defendant's railroad. There is also the further element in this case that such use by the defendant and the operation of its tracks across the plaintiff's tracks is, in substance, a public nuisance. The language is: "The said use by the defendant and by the plaintiff of said tracks is dangerous to public safety and the danger will hereafter be increased." The practical fact that is to be dealt with here is that a condition exists where either the plaintiff or the defendant must give way. The property is not capable of the double use to which it is sought to be put, and either the plaintiff or the defendant must be regarded as the owner of the premises and entitled to the use thereof to the exclusion of the other.

George D. Watrous and *James D. Dewell, Jr.*, for the defendant.

The plaintiff is not the owner in fee of the *locus in quo*.

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The westerly approach to the bridge, called the causeway, started at high watermark at the foot of two public highways. From that point to the opposite shore, the title to the land was in the State. The causeway, including the *locus in quo*, was built out directly from these highways. The public ferry was changed into a toll road and bridge, by the act of the legislature. The public had the same right to pass over the bridge and the approaches thereto, upon the payment of toll, as it had to pass over the ferry. One means for facilitating public travel made way for another. There is nothing distinguishable in the law between a toll-bridge and a turnpike. *Walker* v. *Caywood*, 31 N. Y. 51, 58; *Murray* v. *County Com'rs*, 12 Met. 455; *Com.* v. *Wilkinson*, 16 Pick. 175; Jones on Easements, § 421; Elliott on Streets, 53–55. The plaintiff obtained whatever rights it may have had in or to Bridge street, by a deed from the Bridge Company, and had only such rights as the Bridge Company had in and to Bridge street. But the Bridge Company never obtained any legal right to the flats upon which the causeway is built, and consequently the plaintiff company has no legal right to the part of Bridge street which it occupies with its tracks. If the plaintiff did obtain a good title—a fee—to the part of the causeway crossed by the tracks, its long silence in not objecting to the use the public was making of this causeway over its tracks, is decisive of its intention to dedicate the land to highway purposes. While intention and not time is the essential element, yet time is important as showing the intention, especially where, as here, twenty-six years have elapsed. *Noyes* v. *Ward*, 19 Conn. 250; *Green* v. *Canaan*, 29 id. 157; *Guthrie* v. *New Haven*, 31 id. 308, 321; *N. Y., etc., R. Co.* v. *New Haven*, 46 id. 257, 262; *Hall* v. *Meriden*, 48 id. 416, 428; *Cromwell* v. *Conn., etc., Co.*, 50 id. 420; *Spencer* v. *New York & N. E. R. Co.*, 62 id. 242. This highway has been in continuous use since 1799, and since 1822 without the payment of toll unless the user passed the toll gate. It is utterly impossible to deny the existence of a legal highway, with all of its incidents. An electric railway, as such, in the public highway,

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does not impose an additional servitude upon the land of the abutting proprietor, even if he owns the fee. *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146, 157; *Taggart* v. *Railway Co.*, 16 R. I. 668. This particular electric railway does not impose an additional servitude upon the land of this particular plaintiff, even if it be the owner of the fee. The only contention of the plaintiff is that it is the *use* and *operation* of the railway which causes the damage to it. Here, too, it is distinctly conceded that the damage is not due to the use of electricity or of two tracks rather than one. The plaintiff's grievance is based entirely upon the peculiar use which it makes of the crossing and the adjoining property; not at all upon any unusual or exceptional manner in which the defendant's railroad is operated at that place. The question of danger is a legislative or administrative one, and is entirely eliminated from this case by the action of the legislature, the railroad commissioners and the municipal authorities.

HAMERSLEY, J. In the case of *Imlay* v. *Union Branch Railroad Co.*, it was held that "to subject the owner of the soil of a highway to a further appropriation of his land to railway uses, is the imposition of a new servitude upon his estate, and is an act demanding the compensation which the law awards when land is taken for public purposes." 26 Conn. 249, 259.

The doctrine established in this case has since been treated as settled law; and was affirmed in the very recent case of *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146. In the latter case a distinction is drawn in respect to that class of street railroads that can "be so built and operated as to serve the public, without injury to the landowner." The precise question at issue was the right of the plaintiff (owner of the land covered by the highway) to an injunction restraining the defendant from building a railroad in the highway under authority of a charter which did not contemplate "the construction of a railway in such a manner as substantially to obstruct ordinary highway travel, or necessarily to

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cause special damage to any landowner," when in the complaint "it is not alleged that it is intended to construct it so that any of those effects would be produced." The precise point decided was that an injunction would not issue in such case, because the plaintiff was not entitled to compensation for the disturbance of the soil in the highway made under authority of the State for such purpose. It was assumed that the power of the State to control the land within the lines of its highways, so far as may be necessary to promote their use for public travel without derogating from the general privileges belonging to the public, may be exercised in giving to a railroad corporation the right to lay its tracks in the highway for the purpose of operating a street railroad of the harmless kind indicated; that this new use, although not identical in every particular with the common use for which the way was laid out, may nevertheless be so far identical as to justify the State in so regulating the surface of the highway; and that in such case the owner of the fee is not in fact injured in respect to his land within the highway, and is entitled to no compensation. But the property injured by the layout of a highway, or by its appropriation to a new use, is not simply the land within the lines of the way, but the whole land which is burdened by the way. Compensation is not made merely for depriving the owner of exclusive possession of a strip of his land, but also for the special damage done to his remaining property, by the use of that strip. The compensation for the property taken is measured by the net damage to the whole piece of land. *Trinity College* v. *Hartford*, 32 Conn. 452, 478. For a period long anterior to the adoption of our Constitution, we have recognized these two descriptions of property and elements of compensation. *Peck* v. *Smith*, 1 Conn. 103, 112. And even when the fee of the highway is in the public, the interest of the adjacent lot owners which may be damaged has been held to be property, for the injury of which compensation must be made. *Crawford* v. *Delaware*, 7 Ohio St. 459. And so in the *Canastota Knife Co.* case, in holding that the residuum of possessory right in the owner of the fee is not necessarily invaded by the State

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in authorizing the construction of a railroad in the highway, it was also held that the property of landowners appropriated through special damage caused by the construction or operation of the railroad, must be paid for.

On this subject the court says: "Two rights are to be guarded with equal care,—that of the individual landowner, and that of the public at large. . . . A street railway may be so constructed and operated as to be a proper means of facilitating public travel. It may also be so constructed, but not so operated. It is, in such case, a means that may be and is abused; but for any abuse the law can supply the remedy. Nor would the legislative grant, in such a case, avail to deprive the owner of the soil of his right to compensation. . . . If either the mode of construction or of operation be such as to make it a substantial impediment to public travel *or a proximate cause of special damage*, of a new description, to the owner of the soil, the law will give redress. . . . If special and peculiar damage is done or threatened to any particular landowner, whether the proprietor of the fee in the highway or of adjoining land, his rights of action are clear and certain." And it is stated as a reason for refusing the injunction, that the complaint did not allege that the contemplated railroad would necessarily cause special damage to any landowner.

The case rests on two propositions which must be taken together: one, that the State may authorize the construction and operation of railroads of a certain description within the highway, without invading the possessory rights remaining in the owner of the fee; and the other, that when a private corporation as grantee of such franchise causes special and peculiar damage to any landowner, compensation must be made. This conclusion presents a practical method of dealing justly,—guarding "with equal care the rights of the individual landowner, and of the public at large,"—with the novel questions arising from combining within the same territorial limits facilities for railway travel and ordinary travel; and as a practical result was substantially approved by all the judges, although they differed somewhat widely as to the

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considerations which might most reasonably and logically lead to such a result.

In the present case the plaintiff alleges that the defendant has, without making compensation therefor, constructed a double track electric railroad upon its land, and claims a perpetual injunction restraining the operation of the road, and an order requiring the defendant to remove its tracks. The defense is that the land occupied by the defendant's tracks is a public highway, and is so occupied by authority of the legislature. The complaint also sets out that the alleged highway is crossed by the plaintiff's railroad tracks, and the special damage alleged is largely confined to that arising from a dangerous grade crossing.

If the only interest of both the plaintiff and defendant were a right, derived from the State, of passing over a highway, the one transversely and the other longitudinally, such elements of damage could hardly be the subject of compensation unless by force of special legislation. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.*, 65 Conn. 410, 432. They can be considered only in connection with some deprivation of a property right. There is nothing in the record to distinguish the defendant's road from the harmless street railroad contemplated in the *Canastota Knife Co.* case, unless it be its injurious effect on the property of landowners. The plaintiff (assuming its land to be covered by a public highway) is not entitled to injunction or compensation for the mere occupation of that land by the tracks of the defendant. There must be some peculiar and special damage done to the property of the plaintiff. It is doubtful, at least, whether such special damage is sufficiently alleged in the complaint, although it is found in the agreed statement of facts. If, therefore, the defense were clearly supported by the facts found, we might properly deny the injunction; leaving the plaintiff to its legal remedy for such special damage as it may have sustained. But this defense is not clearly supported. The finding of facts presents a most exceptional case.

The alleged highway which the defendant has occupied,

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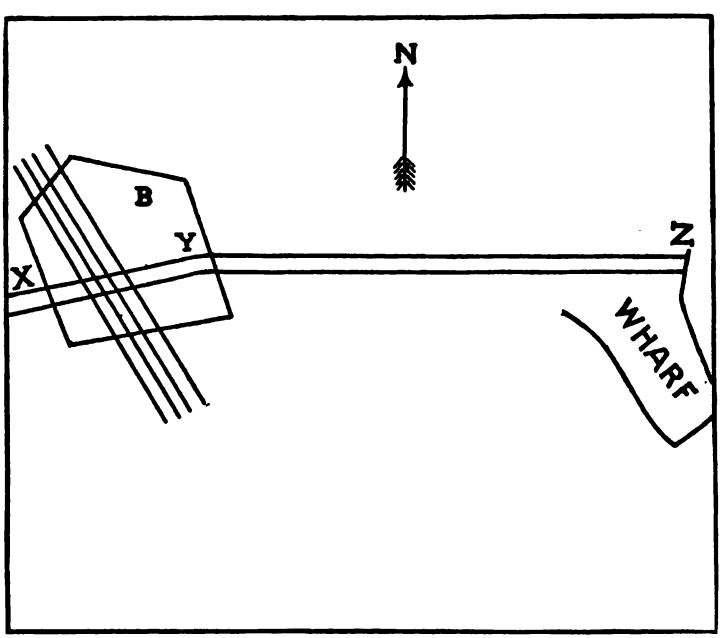
extends from the junction of Bridge and Water streets in the city of New Haven, easterly to a bridge structure over navigable waters connecting New Haven and East Haven; and was originally a causeway built as part of a toll-bridge, extending from high water-mark near the junction of Bridge and Water streets, to East Haven. The easterly and larger portion of this causeway is conceded by the parties to be now a public highway. The controversy is in respect to the westerly portion, where the use of the defendant's road makes the very dangerous grade crossing described. The following sketch of the plaintiff's land upon which the controversy turns (marked on the exhibit as parcel B,) will illustrate the situation.



(The defendant's tracks from Y to Z are laid on a conceded highway; from Y to X they cross the plaintiff's land known as parcel B; from X westerly they are laid on a highway. The plaintiff's railroad tracks cross as indicated.)

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It appears that prior to 1796 there was a public ferry between New Haven and East Haven, having its western terminus at or near the present junction of Bridge and Water streets, with a public highway leading thereto. It does not appear that this landing was in fact interfered with by the bridge, or that the ferry could not be used or was not used after the construction of the bridge. No inferences affecting the present question can be drawn from the mere existence of the ferry. In 1796 "The Company for Erecting and Supporting a Toll Bridge from New Haven to East Haven" (hereinafter referred to as the Bridge Company) was incorporated. It was authorized to erect a bridge across from New Haven to East Haven; to collect the toll specified from all persons using the bridge; to continue the collection of such toll for seventy years, when no more toll was to be collected than the General Assembly should then adjudge to be sufficient to keep the bridge in repair (this term was in 1805 extended to 150 years). It was also authorized, for the purpose of carrying the Act into effect, to purchase and hold lands not exceeding one hundred acres. 1 Private Laws, 241. This charter was accepted, and as early as 1799 the corporation completed its bridge from New Haven, at high water-mark near the western boundary of parcel B, across the navigable waters to the East Haven shore. The westerly 1,230 feet consisted of a causeway about fifty feet wide. This charter could not be altered at the pleasure of the General Assembly (except so far as any property may be reached in the exercise of the police power);—and in amendments enacted subsequent to our Constitution the legislature has expressly provided that the acceptance of such amendment shall not operate to subject the charter to such alteration. After the construction of the causeway and prior to 1840, the Bridge Company obtained the title to the flats and the structures thereon, embracing the locality and the territory upon all sides adjacent thereto; and from time to time filled in said flats and built and extended wharf property thereon, on both sides of said causeway. The Bridge Company was authorized by its charter to acquire and hold this land. Said wharf

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property is generally known as Belle Dock or Steamboat Wharf, and is the terminus of the plaintiff's railroad connecting its land with water travel. The Hartford & New Haven Railroad Company, now merged in the plaintiff corporation, was chartered in 1833, with authority to construct a railroad "to the navigable waters of New Haven harbor, at some point between the canal basin and the west end of Tomlinson's bridge, so-called," *i. e.*, the bridge in question; and also to purchase and hold steamboats to be used in connection with their road. 4 Private Laws, 900. In 1840 the H. & N. H. R. Co. purchased and by deed obtained the right to the full and unrestricted use of all and so much of the lands, wharfs, flats and other property of the Bridge Com pany, as at any time it might have occasion to occupy in order to construct and maintain its railroad to navigable waters and to operate its railroad in connection with steamboats for the carriage of passengers or freights. In pursuance of its charter and of the rights acquired by this deed, the Railroad Company built its tracks to navigable water, occupying for passage, freight houses, stations, etc., the causeway, lands, flats, wharfs, etc., of the Bridge Company. Soon after 1850 the Railroad Company ceased to run its passenger trains to the steamboat wharf and in 1861, upon application of the Attorney for the State, the Superior Court by mandamus compelled the company to so run its trains (29 Conn. 538), and since then its trains have been run in obedience to that mandate. In 1868 it became necessary to widen and extend the depot grounds of the H. & N. H. R. Co., then lying northerly of the Bridge Co.'s property, so that they should include parcel B and extend to tidewater, and the company applied for condemnation proceedings. The railroad commissioners, empowered by statute to authorize the condemnation, found that public necessity required the taking of two pieces of land, *viz.*, parcel B, and a strip connecting with that, extending along the southerly line of the causeway to the wharf. This land was duly condemned, as was also the right of ingress to and egress from all parts of the above described grounds by and over

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all parts of the causeway or roadway owned by said Bridge Company and lying adjacent to said above described grounds, for the use of said Railroad Company, its servants and all persons having business with it. The condemnation of parcel B was made "subject to whatever rights of crossing the same now exist by law." Shortly afterwards the Bridge Company, by quitclaim deed, conveyed to the Railroad Company "the entire residuum of title and interest in the above described premises now remaining in said releasor." Prior to this condemnation the Railroad Company had merely the right to cross the causeway of the Bridge Company, derived both from its charter and the deed of 1840. But upon the condemnation, its depot grounds were extended over the property of the Bridge Company to the wharf at tide-water, including the strip 110 feet long that had been used by the Bridge Company as a part of its bridge. The exclusive use of all this land for the purposes of depot grounds was vested in the Railroad Company by authority of the State, and the absolute title for all purposes was vested by virtue of the deed of release.

The only limitation on absolute ownership is such rights of crossing the land included in parcel B, as "now exist by law." The only right of crossing then existing by law, was that connected with the use of the toll-bridge. The ownership of the Bridge Company passed to the Railroad Company, but that ownership was coupled with an obligation to permit and maintain a passage for the uses of the toll-bridge as then existing by law; and the finding states that since the deed of release of 1868 the plaintiff has used, maintained and repaired the 110 feet of the causeway included in that deed; thus fulfilling the obligation of the Bridge Company.

It is suggested that because, when the bridge was first constructed, the toll-gate was placed at the extreme western end, and in 1820 was moved 1,200 feet easterly and placed near the commencement of the bridge structure proper, a dedication of that 1,200 feet of causeway as a public highway must be inferred. The location and change of the toll-gate depended on the will of the company,—in this respect

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differing from toll-gates on ordinary turnpikes; its rights in the bridge, which included the causeway, remained unchanged, wherever the toll-gate might be, so long as its charter obligations were fulfilled; nor were they affected by allowing a portion of the public to pass to the company's wharf property; neither the bridge nor the wharf property could thus be made public property. Dedication implies intention on the part of the owner and acceptance by the public. Here there was neither. *Williams* v. *New York & N. H. R. Co.*, 39 Conn. 509.

It is claimed that in 1868 the defendant was entitled by law to cross parcel B, with its railroad tracks. This claim may include the claim that there is no distinction between the power of the State to authorize the construction of a railroad upon a turnpike or a toll-bridge, and its power to authorize a railroad upon a statutory highway. We think there is a material difference, although in some reported cases it seems to have been overlooked. The difference is this: in the one case the possessory right disturbed by the railroad belongs to the State, and in the other it belongs to a private corporation. The establishment of every public highway (whether by layout or dedication), involves in the State a duty of maintenance and a power to do all acts incident to the performance of that duty. In the construction and maintenance of a highway a valuable property is accumulated which belongs to the State or its agents. This interest of the State in a highway may be given away by the State without compensation, unless its agents have acquired a vested right. But in the case of a turnpike, the right and duty of maintenance included in the franchise, and the accumulation of property in the construction and maintenance of the road, belongs to a private corporation. It constitutes property in that corporation entitled to protection. *A fortiori* is this true of a toll-bridge. A bridge-way not one mile in length might cost $500,000 to construct, and is property both in the value of the franchise and in material. It is difficult to see how the State can, without compensation, appropriate this, any more than other property, to the uses

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of another corporation. The charter of such a corporation may be forfeited, as any charter may; but the property belonging to the corporation cannot be confiscated in whole or in part. This view is indicated in *Sherwood* v. *Weston*, 18 Conn. 32, 47. But we fail to find in the defendant's charter any authority to use this bridge-way without compensation. It was granted in 1860 (5 Private Laws, 370), and authorized the defendant to build a single or double track railroad on certain specified streets; and also to construct a branch from the junction of Grand and East streets through East street to Bridge street; thence through Bridge street to the steamboat landing. At that time Bridge street terminated at the commencement of the Bridge Company's property. There is nothing in the record to indicate that the bridge-way was then known as Bridge street. On the contrary, Bridge street is said in the finding to abut on the bridge property, and is so described in the condemnation proceedings of 1868; and the defendant, in a document signed by it in 1866, says that it has built its railroad to a point near the lower end of Bridge street and is desirous of extending the same to and along the causeway of the Bridge Company to a point near the steamboat landing. It is evident that the legislature did not attempt to authorize the defendant to lay its tracks over any property of the Bridge Company without compensation; and for this reason, if not for others also, the defendant was given power to take land and property by right of eminent domain. The charter says it shall be vested with the powers and privileges and be subject to the duties, so far as applicable to a horse railroad, expressed in an Act relating to railroad companies, passed in 1849. Section 10 of that Act provides that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out, making and maintaining their road," and after describing the mode of appraisal, says: "*Provided*, that no railroad shall be worked upon, or opened across the lands of any person, until the damages assessed to such person shall have been paid, or secured to be paid to his satisfaction, or deposited with the treasurer of the county for his use." That

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these provisions—as applicable to a horse railroad as to a steam railroad—became a part of the charter, is made clear by the provisions of § 6 of the charter giving additional facilities for condemnation in respect to property of *feme coverts*, infants, etc.

In 1865 the defendant undertook to lay its tracks upon the causeway of the Bridge Company across parcel B, and was stopped by a temporary injunction obtained by the Bridge Company. Thereupon, and upon application of the defendant, the Bridge Company, with the consent of the Railroad Company, made an agreement with the defendant, dated April 25th, 1866, whereby the Bridge Company agreed to permit, upon the conditions set forth, the defendant to extend the track of its horse railroad across the tracks of the N. H. & H. R. Co., and along the causeway to a point near the wharf; and the defendant agreed to construct and maintain such arrangements for crossing the tracks of the Railroad Company as should be approved by its superintendent, and to repair and care for that portion of the causeway occupied by its track, to the satisfaction of said superintendent. The agreement then stated: "It is understood that it is not intended to convey to said Fair Haven and Westville Horse Railroad Company by this instrument any right or interest in or to the said causeway, or to the land over which said horse railroad track may be laid, but simply to grant, for the public accommodation, to said railroad company, the privilege of constructing and operating said horse railroad thereon for an indefinite term. And if at any time hereafter it shall be deemed by the board of directors of said bridge company that the public accommodation does not longer require said horse railroad track to be continued on said causeway and property of said bridge company, or if for any other reason said board of directors shall be of opinion that it is expedient that said horse railroad track should be removed, said directors may give notice of such decision to said railroad company, and thereupon within six months from the day of giving such notice, said tracks shall be removed by said horse railroad company, and the privileges thereby granted

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shall cease and be determined." And the agreement further stated that the defendant assented and agreed to the above conditions, and accepted the privileges granted subject thereto. This agreement was signed by the Bridge Company and by the defendant. In 1882, by agreement between the defendant, the Bridge Company, and the plaintiff, a change in the position of the track on the causeway was authorized, "all the conditions and limitations of said original permit to remain in full force both as to said original and this additional permit." The defendant occupied the causeway under this license until 1893, when by vote of the directors of the Bridge Company the license was revoked and notice given to the defendant. The horse railroad track has been removed, and a double track electric railroad has been laid.

In 1886 the Bridge Company sold and conveyed to the city and town of New Haven, its toll-bridge and causeway, bounded westerly by parcel B belonging to the plaintiff, and easterly by high water-mark on the easterly side of New Haven harbor, the municipal corporations agreeing to maintain the same as and for a public highway until the same be legally discontinued; but upon such discontinuance the same, disburdened of the servitude of such use, was to revest in the releasor as fully as if the deed of conveyance had never been executed. This sale was made in pursuance and under authority of a special Act passed in 1867, authorizing the Bridge Company "to sell and dispose of said bridge, or any part thereof," to the town and city of New Haven, or to such person or corporation as may desire to purchase the same. The Act provided that its acceptance by the Bridge Company as an amendment to its charter should not affect the inviolability of the original charter or any amendments thereof; also that a sale under authority of the Act should not impair in any manner the rights of the company to all its property not sold under authority thereof, but that all such property should be and remain vested absolutely in such company. 6 Special Laws, 182. After this sale and down to the present time, the city of New Haven has maintained said causeway so purchased and lying east of parcel

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B, as a public highway; and the plaintiff has continued as before and since 1868 to use, maintain and repair that part of the bridge or old causeway not sold to the city and lying within parcel B.

In 1895 the General Assembly authorized the merger of the Bridge Company and the plaintiff, and the plaintiff has succeeded to all rights, franchises and property granted and belonging to the Bridge Company, subject to the duties imposed upon the same by its charter and amendments thereto. 12 Special Laws, 632.

The defendant has no authority to lay its double track electric railroad, by virtue of the conditional permit given it to lay a horse railroad track in 1866. It has no authority to lay such track under its original charter, without first making compensation. The sale to the city of New Haven of a part of the bridge in 1886, does not give the defendant or the municipal corporation any rights in respect to the part not sold, and belonging to the plaintiff since 1868. If a city sees fit to lay out a new highway so that its use depends in part on a limited right of crossing private land, defined by matter of record, and does not see fit to lay out any highway over that land, the rights of the owner cannot be affected by the construction of the new highway, or by its use in connection with the crossing of his land in pursuance of the rights of crossing established and recorded.

The defendant claims, however, authority to lay its tracks under an amendment to its charter passed in 1893. That amendment authorizes the defendant to lay its tracks in a large number of streets specifically named, not including the crossing of the plaintiff's land. That right is claimed from a general clause which authorizes the defendant "to lay a second track in those streets of the city and town of New Haven which it now occupies with a single track, except West Chapel street." 11 Special Laws, 1040. The crossing on the plaintiff's land is not a street, within the meaning of the Act authorizing the use of a highway without compensation; that is, this crossing is not a public highway of which the State, either by itself or public agencies, has complete

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control for all purposes of maintenance or repair and is the owner of the property accumulated in the construction and maintenance of the way. Such franchise and property, by force of the charter of 1796, was vested in the Bridge Company; and is now vested in the plaintiff. It was not the purpose of this general clause to adjudicate any question of title, or to alter the defendant's charter in respect to its power to take land, or lay its tracks without compensation; it simply authorized a second track to be laid under the same restrictions of charter and law applicable to a track already laid. It is doubtless true, and this appears more clearly from other parts of the amendment, that the legislature intended to authorize the defendant to cross the plaintiff's land where it has laid its tracks; and we assume that the defendant has such authority. But the granting of that authority cannot alter the nature of the plaintiff's ownership. The plaintiff clearly has whatever rights of property belonged to the Bridge Company in 1868; and the Bridge Company had then a property interest which could not be taken without compensation. But the title of the plaintiff is derived not only from the Bridge Company, but from the State, which in the exercise of the power of eminent domain authorized the plaintiff to acquire the ownership and exclusive use of all this land, subject only to such rights of passage over the same as existed by law in 1868. The railroad commissioners were authorized by the State to condemn this land for depot grounds and, for the same purpose, to condemn a portion of the Bridge Company's bridge; or, if there had been a highway there, to condemn the highway. *State* v. *Railroad Com'rs*, 56 Conn. 308, 314. For the property so condemned the plaintiff had to pay the damages ascertained according to law; and upon such payment the property condemned belonged to the plaintiff, and could not afterwards be taken away by the State without compensation. As the railroad commissioners had the power to condemn a bridge-way or a highway absolutely, they had the power to condemn it conditionally; and this course they pursued.

It is now claimed that after a lapse of twenty-five years,

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after the plaintiff has invested large sums in adapting its land to the uses to which it was condemned, after an exclusive use for that purpose has become almost a necessity, the defendant can divide the depot grounds by a double track electric railroad and occupy the plaintiff's land without compensation; and that this use of the plaintiff's land is a "right of crossing" existing by law in 1868. This claim rests on the theory that there was no condemnation of any way; that the bridge-way was the exact equivalent of a public highway; and therefore the State may authorize the laying of the railroad tracks without compensation to the plaintiff.

This theory is wholly wrong. We have called attention to the material distinction between a bridge-way and a public highway; and there can be no question but that the bridge-way was in fact condemned. The Bridge Company had no subsequent control of that way; all power of control and every right of property became, by the condemnation, vested in the plaintiff. The bridge-way became a part of the plaintiff's depot grounds, subject only to the condition of the condemnation, *i. e.*, such "rights of crossing as now exist by law." This language cannot be construed as meaning the "bridge-way now existing," and certainly not as meaning the "highway now existing;" it must be construed consistently with the fact of condemnation of an existing way. That way existed by law and was condemned by law; but there were rights of crossing the land so condemned, then existing by law, in each one of the public having occasion to use the bridge; those rights were continued, but in all other respects the way was condemned and became the property of the plaintiff.

The reasonableness and necessity of such a construction is apparent when we consider the purpose for which the condemnation was made, and the surrounding circumstances. The exclusive use of the land necessary for depot grounds, was provided for by the condemnation of the way; the continued use of the bridge, by a reservation of the existing rights of crossing. These rights had no reference to the power of the Bridge Company, as agent of the State, over

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the way as a highway,—that was condemned and paid for by the plaintiff; the rights referred to are those of crossing then secured by law to each member of the public having occasion to use the bridge. The right to cross this land with a railroad, which could only exist by force of future legislation, was not a right of crossing then existing by law within the meaning of the Act of condemnation.

The plaintiff has done nothing to qualify its rights of property acquired in 1868. It has fulfilled its obligations in respect to the crossing to which its land is subject, and has maintained and repaired that crossing as the owner thereof; nor does it appear that either the State or city of New Haven has exercised in respect to the crossing any duty of maintenance as the owner of a public highway. In view of all these special circumstances, we think the plaintiff stands in a different position from that of an adjoining proprietor owning the fee of an ordinary public highway; that it has a property in this crossing which the defendant has taken; that the defendant's charter as amended did not authorize it to take this property without compensation, but, on the contrary, made it liable for all damages occasioned by making its road, and provided the method for appraisal of such damages; and also provided that the road should not be opened across the lands of any person without compensation for damages. If the charter makes an appraisal a condition precedent to opening the road across the plaintiff's land, the injunction asked for must be granted, but if the charter cannot be so construed, granting the injunction may be a matter of discretion. In either view, we think an injunction should be granted.

The finding states that in 1893, when the defendant's permit to use a single track horse railroad was revoked, it had become necessary to the safe management of the plaintiff's road, to stop the use of said crossing by the defendant and its cars; that such crossing and use of the plaintiff's property and tracks by the defendant, seriously interfered with the management of the plaintiff's business and the proper use of its property and safe operation of its road; and that this use of the plaintiff's land by the defendant materially dimin-

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ishes to the plaintiff the value of its property and depot grounds. Upon this state of facts an action for damages would not be an adequate remedy.

It appears that the defendant has obtained from the railroad commissioners an approval of the grade-crossing, and from the authorities of New Haven an acceptance of its plan of construction. These proceedings are necessary to the construction of the road, but have no relation to the defendant's right to take the plaintiff's property without compensation.

The Superior Court is advised to render judgment granting the prayer of the plaintiff's complaint; the terms of the injunction, consistent with the enforcement of the plaintiff's rights as decided, to be settled by the Superior Court after a hearing for that purpose.

In this opinion ANDREWS, C. J., and HALL, J., concurred.

TORRANCE, J. (dissenting). In this case I feel obliged to dissent from the conclusion reached by a majority of the court, that the plaintiff is entitled to an injunction. The *locus in quo* is a small piece of land near the westerly end of what is called the "causeway" leading to "Tomlinson's Bridge," so-called, and lies wholly within the limits of said causeway. It is now crossed by certain tracks of the plaintiff and by the double tracks of the defendant's electric street railway. The plaintiff asks for an injunction to restrain the defendant from operating its street railroad over the *locus*, and an order requiring it to remove its tracks therefrom. The defense is, that the *locus* is a public highway and is occupied by the defendant under the authority of the legislature. With reference to this defense the majority opinion says this: "The plaintiff (assuming its land to be covered by a public highway) is not entitled to injunction or compensation for the mere occupation of that land by the tracks of the defendant. There must be some peculiar and special damage done to the property of the plaintiff. It is doubtful, at least, whether such special damage is sufficiently alleged

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in the complaint, although it is found in the agreed statement of facts. If, therefore, the defense were clearly supported by the facts found, we might properly deny the injunction; leaving the plaintiff to its legal remedy for such special damage as it may have sustained. But this defense is not clearly supported."

The defense, as before stated, was (1) that the *locus* was a public highway; (2) that it was occupied by the defendant for a street railway by legislative authority. Upon the facts found it is clear, and is not disputed, that this second part of the defense is true. The defendant's tracks were laid there and it operates its road there, by legislative authority. The only question then is whether the first part of the defense—that the *locus* is a public highway—is supported by the facts agreed upon. If it is, the majority opinion concedes that the injunction ought not to issue.

The main facts bearing upon this point are these: The Bridge Company was incorporated in 1796 to build and maintain a bridge across New Haven harbor to East Haven. In 1799 it built and completed a bridge, and a causeway leading to it, from the present junction of Bridge and Water streets in New Haven. The causeway was about fifty feet wide and about twelve hundred feet long. When this was done the Bridge Company erected a toll-gate at the westerly end of the causeway, and took toll there. In 1822 the Bridge Company removed the toll-gate to a point near the westerly end of the bridge, where it remained until the bridge was made a free bridge, in 1886. Prior to 1840 the Bridge Company obtained title to the flats in the vicinity of the bridge, filled them up and reclaimed the land, and built public docks or wharves there and otherwise used the reclaimed land as its own. In 1840 the plaintiff acquired the right from the Bridge Company, to use such property of the Bridge Company in the vicinity of the causeway as it might require for railroad purposes, and in connection with its use, of the docks there. Under the rights thus acquired the plaintiff, in 1841, laid its tracks across the westerly end of the causeway substantially where they now run. In 1865 the defend-

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ant attempted to lay its tracks for a horse railroad upon the causeway, crossing the tracks of the plaintiff, and was stopped from so doing by an injunction procured by the Bridge Company. Thereupon the Bridge Company, with the consent of the plaintiff, granted to the defendant a written license to lay its tracks there, under which license, accepted by the defendant, it laid and operated its horse railroad until said license was revoked by the Bridge Company in 1893.

Upon the facts found, I do not think this license has any bearing upon the question whether the causeway was or was not a public highway, and it may therefore be laid out of the case.

In 1868 the plaintiff brought proceedings to condemn and did condemn and take two certain described pieces of the Bridge Company's property in the vicinity of the causeway. One of these pieces, the smaller one, is the only one we are here concerned with, as it includes the *locus in quo*. This piece is known in the record as parcel B. The precise *locus in quo* is a small part of parcel B near the westerly end of the causeway, and lying wholly within the limits of the causeway, substantially covered by the crossing tracks of the plaintiff. Parcel B was taken by the plaintiff under its condemnation proceedings, "subject to such rights of passage over the same as now exist by law." This is the language used by the plaintiff, and it is clearly broad enough to include a public highway, if one then existed over parcel B. Subsequently in the same year (1868) the Bridge Company conveyed to the plaintiff by deed whatever residuum of rights it had, if any, in parcel B, which had not been taken by the condemnation proceedings.

So far as the persent question is concerned, I think this deed conveyed nothing to the plaintiff. It had already acquired whatever rights the Bridge Company had in parcel B. It is under the condemnation proceedings and this deed that the plaintiff claims to be the owner in fee of the *locus in quo*, free from the servitude of a highway, at least so far as the defendant is concerned. In 1886 the Bridge

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Company, under the authority of the legislature, conveyed to the city and town of New Haven all its right, title and interest in and to the bridge and causeway, "as and for a public highway, free to the use of all the public as all other highways of said city and town now are." It thus appears that from 1799 down to 1898 the entire causeway and bridge formed part of a public highway; not a free public highway, it is true, because toll was exacted if you crossed the bridge, until 1886, but still a public highway. The Bridge Company could neither close it nor dispose of it without legislative authority. It is conceded that all the rest of the causeway east and west of the *locus in quo* is now a free public highway, for all purposes. The plaintiff admits, for the purposes of this case at least, that the *locus in quo* is a public highway for all purposes and uses except the purposes and uses of a street railway. How did the causeway become a public highway? Not by the deed of the Bridge Company to the city and town in 1886; that only made it a free road. It has been a public highway since 1799 by virtue of its layout and maintainance by the Bridge Company as the agent of the legislature, and it has been a free public highway since 1886.

The claim of the plaintiff is that a small part of the causeway is not a highway for the purposes and uses of a street railway, while all the rest of it is a highway for all purposes and uses. I am unable to see any reason for making a distinction in this respect between the *locus in quo* as part of the causeway, and any other part of the causeway. If the one is a public highway the other is also. Upon the agreed facts, then, I think that the entire causeway in 1868 was subject to the servitude of a public highway, and that the plaintiff took the *locus in quo* and holds it subject to that servitude. For this reason I think the defense put forward is fully supported by the agreed facts; and if this be so the majority opinion concedes that no injunction should issue, even if the plaintiff is entitled to damages for the acts of the defendant.

But I dissent entirely from the further conclusion reached

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in that opinion, that upon the agreed facts the plaintiff's rights have been so invaded by the acts of the defendant as to entitle it to damages under the principles laid down in the case of *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146. In laying its track over the *locus* and in operating its railroad there, it is conceded that the defendant has fully complied with all the requirements of the law. The majority opinion concedes that "there is nothing in the record to distinguish the defendant's road from the harmless street railroad contemplated in the *Canastota Knife Co.* case, unless it be its injurious effect on the property of landowners," meaning, I suppose, the plaintiff. That opinion further concedes that the plaintiff is not entitled to compensation for the mere occupation of its land by the tracks of the defendant; that there must be "some peculiar and special damage done to the property of the plaintiff" to entitle it to damages; and that it is doubtful whether such special damage is sufficiently alleged in the complaint. It states, however, that the agreed facts show such special and peculiar damage resulting to the plaintiff here. I cannot assent to this.

The agreed facts show that the tracks of the plaintiff over the *locus in quo* are not its main line tracks. They lead to its freight yard and freight depots, and are used mainly for freighting and switching purposes. In the agreed statement of facts, the "peculiar and special damage done to the property of the plaintiff" is set forth in paragraphs 21–26 and 29. These statements amount to this, in substance: Owing to the growth of the city, the use of this crossing by the general public and by the defendant has greatly increased of late years and will continue to increase; and owing to the increase of the plaintiff's business, its use of this crossing and of its freight yards and depots adjoining has greatly increased and will continue to increase. This use of the crossing by the general public and by the defendant seriously interrupts, delays and obstructs the plaintiff's business here, and interferes with the proper use of its property, and the proper, safe and economical operation of its road. It makes

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this a very dangerous grade crossing. It imposes expense upon the plaintiff "in providing watchmen, gatemen, trainhands, and safeguards to reduce as far as possible the danger and damage to the public and to itself."

These, in brief, are the facts agreed to upon this point, so far as they concern the damage to the plaintiff. These facts do not show any peculiar and special damage done to the property of the plaintiff by the defendant, within the meaning of the principles laid down in the *Canastota Knife Co.* case. They show the existence of a very dangerous grade crossing here; dangerous to the plaintiff, to the defendant and to the general public. The plaintiff is undoubtedly hindered and delayed in its business and put to expense by reason of the existence of such a crossing; but that delay and expense is caused not by the defendant, specially or primarily, but by the fact that the plaintiff's tracks are laid across a public highway, the use of which by the general public becomes greater every year. I agree that this grade crossing should be abolished as soon as possible, but the fact that it exists is no reason why, upon the agreed facts, the defendant should be enjoined from operating its street railway there.

In this opinion PRENTICE, J., concurred.

Application for leave to file a motion for reargument was made July 23d and denied July 26th, 1898.

COURT HARMONY, A. O. F., *vs.* COURT ABRAHAM LINCOLN, A. O. F.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The defendant, a voluntary benevolent association, alleged that the bill of exchange upon which it was sued was given for a purpose foreign to and in violation of its constitution and by-laws. This averment the plaintiff denied. *Held* that the extent of the defendant's powers under its constitution and by-laws was a question of law

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for the court, while the purpose for which the bill of exchange was in fact given, was a question for the determination of the jury.

It is within the power of a voluntary benevolent association to give a promissory note or bill of exchange for the purpose of compromising a suit pending against it.

[Argued May 6th—decided June 17th, 1898.]

ACTION upon a bill of exchange, brought to the District Court of Waterbury and tried to the jury before *Cowell, J.;* verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors in the rulings and charge of the court. *No error.*

The complaint was in two counts: one on a bill of exchange; the other "the common counts." Under the latter no bill of particulars was filed. There is no question made on it, and it really has no place in the record.

The answer is in four defenses: a general denial, and three so-called special defenses. The first of these is to the effect that the said bill of exchange was given to the payee without consideration, and that the payee indorsed it to the plaintiff also without consideration. The second of these defenses is that said bill of exchange had never been delivered to the payee, except on a condition which had not been complied with, and that the condition and non-compliance was known to the plaintiff when he took the same.

The third defense is as follows: "1. The object and purpose of the defendant association always has been and is to provide for its members in sickness and distress, and to aid said members and their families in the event of sickness and distress; and the money belonging to the defendant is a trust fund for that object and purpose, and these facts are and always have been well known to the plaintiff. 2. Said bill of exchange was not given for the object and purpose stated in the foregoing paragraph, but was given without any authority of law, and contrary to the constitution, by-laws, rules, and regulations of said Court Abraham Lincoln, a copy of which is hereto annexed marked exhibit A." The reply denied all these defenses.

The case was tried on all the issues to the jury, and a gen-

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eral verdict was returned in favor of the plaintiff, from which the defendant appealed to this court assigning various reasons of appeal.

John O'Neill, for the appellant (defendant).

Frederick M. Reasley, for the appellee (plaintiff).

ANDREWS, C. J. We think all the evidence to which objection was made was properly admitted. It was relevant under the general denial, or under the first or second of the so-called special defenses.

The charge as given was free from error and was fairly well adapted to the questions of fact made in the case. And we think the requests to charge, made by the defendant, were rightfully disregarded. They were inappropriate to any question of fact presented on the trial.

Whatever uncertainty there is in this appeal, arises from the matter stated in the third special defense, which is set out in full in the statement of the case. That defense seems to present matters of law, rather than matters of fact. Its pertinency, apparently, depends on the construction of the constitution, by-laws and rules of the defendant, as set forth in Exhibit A, made part of that defense. This exhibit is a small book of some fifty or sixty pages, containing the constitution, by-laws and rules of the defendant. The construction of such writings or documents is ordinarily matter of law. *Jordan, Marsh & Co.* v. *Patterson*, 67 Conn. 473, 479; *Auffmordt* v. *Stevens*, 46 id. 411, 413.

There is in this defense—though perhaps somewhat less prominently—a question of fact: that is, that the said bill of exchange was given without authority of law and contrary to the constitution, by-laws and rules of the defendant, as set forth in the said exhibit. It is this question of fact which the parties appear to have contested before the jury. The court instructed the jury that if the bill of exchange, to recover which the action was brought, was given by the defendant to compromise a suit, or suits, which were pending

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against it, then the bill was given not without authority of law and not against the constitution, by-laws and rules of the defendant association.

We think this was correct. The defendant is a voluntary association. As such it was liable to be sued. General Statutes, § 979. And if sued, judgment could be rendered and execution issued. General Statutes, § 1169. The association could, of course, if sued, compromise the suit. Such a compromise would be a good consideration for a note or bill given by way of compromise. *Mascolo* v. *Montesanto*, 61 Conn. 50, 54. Any asset of the association which could be taken on an execution against the association, would be liable to be taken to pay such a note. The rules of the defendant —sixty-five and sixty-six in said exhibit—provide for a special fund which could be used by the defendant, consistently with the purpose for which it was organized, to pay the note in suit. The question before the jury was whether or not the plaintiff was entitled to have judgment, not whether it would be able or unable to collect the judgment wher rendered.

There is no error.

In this opinion the other judges concurred.

HENRIETTA M. HEWIT ET AL. *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

H, who owned land in fee, subject to the life use of his sister *C*, quit-claimed all his title to "the children of *C* who shall be alive at her decease, and the issue of any child or children, if there be any, their heirs and assigns, in equal shares *per stirpes*, to have and to hold unto the said releasees, their heirs and assigns forever." The deed stated that the intent was "to release to my sister's (*C's*) children this property, which their grandfather intended to convey

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to them by will." At its date *C* was 61 years old and had six children living, and five grandchildren, the children of one of her sons. In a suit to determine the respective rights of the parties, it was *held* :—

1. That the main object of the grantor evidently was to provide for the ownership and enjoyment of the land after *C*'s decease.
2. That the possibility that some of the members of the class described therein as grantee,—a class whose membership could not be definitely ascertained until *C*'s death,—might be persons who were neither in being when the deed was delivered, nor the immediate issue of such persons, rendered the whole conveyance invalid under the statute (General Statutes, § 2952) against perpetuities then existing.

A covenant to stand seized to uses, or a declaration of trust, intended to serve an estate in land forbidden by statute, is void *ab initio*.

[Argued April 28th—decided June 24th, 1898.]

ACTION to determine the respective rights of the parties in and to certain real estate, brought to the Superior Court in Fairfield County and reserved by that court, *Thayer*, *J.*, upon an agreed statement of facts, for the consideration and advice of this court. *Trial court advised that defendant has full legal and equitable title to the land.*

The deed in question was executed and delivered in 1886 by Samuel H. Hurd, and purported, "for the consideration of one dollar, received to my full satisfaction of Catherine S. Hewit," to release all his title to certain land in Bridgeport, "unto the children of the said Catherine S. Hewit, who shall be alive at her decease, and the issue of any child or children, if there be any, their heirs and assigns, in equal shares *per stirpes*," *habendum*, "unto the said releasees, their heirs and assigns forever." It was added that "the intent of this instrument is to release to my sister's children this property, which their grandfather, Samuel F. Hurd, intended to convey to them by his will dated February 1st, 1854, now on file on record in the Probate Court of the district of Bridgeport." At the date of the deed, the releasor owned the land in fee, subject to the life use of his sister Catherine S. Hewit, who was 61 years old and had living six children and, by one of her sons, five grandchildren. The deed was recorded in 1886. Mrs. Hewit, in 1897, released her interest to Hurd,

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and he thereupon executed and delivered to the defendant railroad company a warranty deed of the land. At this time five of her children were living, and several were married and had children living.

The suit was originally brought against the New York, New Haven and Hartford Railroad Company alone, and came in that form, upon a reservation, before this court at a previous term, when the court declined to hear it, and remanded it to the Superior Court, in order that all the children of Mrs. Hewit and their living issue might be made parties. This was subsequently effected.

The plaintiff was one of the children of Mrs. Hewit, and asked for an adjudication of the rights of all claiming under either deed. The New York, New Haven and Hartford Railroad Company alone appeared to defend, and filed an answer claiming an absolute title to the land in question, under the second deed.

Morris W. Seymour, for the plaintiffs.

The deed does not sin against the statute of perpetuities. The true interpretation of this instrument is to vest an immediate estate in the children of Catherine S. Hewit, subject to have the same divested upon the death of any such child before his or her mother. The fact that the enjoyment of the estate is postponed until after such death, ought to make no difference. But assuming that this estate did not vest until after the death of Catherine S. Hewit in any one, we submit that this deed vests this estate in persons in being, or their immediate issue or descendants. The word "heirs" is a word of limitation and not of purchase, vesting the estate absolutely. *Chappell* v. *N. Y., etc., R. Co.*, 62 Conn. 195, 202. Again, this is shown by the use of the word "assigns." The words, "and the issue of any child or children," vest the estate not indefinitely in heirs, but the immediate issue of the children of Catherine S. Hewit. There is no contingency that could happen which would prevent this estate from vesting absolutely in the children or grandchildren of Catherine S. Hewit, upon her decease.

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William D. Bishop, Jr., for the defendant.

The deed is void for violating the statute against perpetuities. Whatever meaning this document has, if any, we believe it is beyond question that the description of the grantees includes some of the descendants of Mrs. Hewit's children. On that assumption the deed is void, whether an interest vested at once in such of Mrs. Hewit's children and their descendants as were *in esse* at the delivery of the document in 1886, subject to open and let in after-born persons of the same description, or at some later time. In either event the interests of each grantee are bound up with those of all the rest, and must stand or fall with them. *Leake* v. *Robinson*, 2 Meriv. 363; *McArthur* v. *Scott*, 113 U. S. 340, 382; *Leake* v. *Watson*, 60 Conn. 498, 512; Gray on Perp. §§ 215, 373.

BALDWIN, J. Deeds, like all other contracts, are to be construed so as to carry out the intent of the parties to them, if this be permissible under the rules of law. In the quitclaim deed given by S. H. Hurd, in 1886, the intent is stated to be to release his title to his sister's children. She then had six living, and it would have been a simple matter, had that been his sole purpose, to make the conveyance directly to them. The language of the deed, however, is such as to show that there was a further intent to provide for the contingency of the death of any of them, during their mother's life. So long as that continued she had the full use of the land under a prior title, and it is evident that the great object of the parties was to provide as to its ownership and enjoyment after her decease.

To accomplish this purpose they undertook to create a freehold estate to commence *in futuro*, without any precedent estate to support it, and in favor of persons who were not to be definitely ascertained until the event should occur, upon which it was thus to commence. The grantees were a class which was not to be formed until the termination of Mrs. Hewit's life. It was to be composed of her children "who shall be alive at her decease, and the issue of any

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child or children, if there be any." It must be presumed that the releasor when he gave the deed, knew that one of his nephews then had several children. His reference to "the issue of any child or children, if there be any," must therefore be deemed to include only such issue of any child or children as might survive Mrs. Hewit. The same contingency which applied to her children was to apply to their issue, and constituted a condition precedent to the vesting of any estate. To construe the deed as giving to the children who were in being, when it was delivered, and to their issue then in being, any present interest, would be to disarrange the general scheme for an equal distribution, and might virtually double the share of James H. Hewit. He then had five children. His brother and sisters had none. If he and these five children could be regarded as invested by the deed with defeasible estates, or one subject to a conditional limitation, to become absolute should they survive Mrs. Hewit, then, upon that event, he would come into the enjoyment of one share of the estate and his children into that of another and equal one.

The words of limitation, which follow the description of the releasees, "their heirs and assigns, in equal shares, *per stirpes*," and the *habendum* clause, which runs "unto the said releasees, their heirs and assigns forever," show that whoever was to take the estate released was to take it in fee simple, and to receive a share no larger than that naturally belonging to his line of descent.

The statute against perpetuities which was in force in 1886 (General Statutes, § 2952) provided that no estate should be given by deed to any persons but such as were in being at the time of its delivery, or to their immediate issue or descendants. The deed in question purported to give an estate to a class to be formed at the decease of a person named, some of the members of which might not be either persons who were in being at the time of its delivery or children of such persons. A grandchild of Mrs. Hewit might have been born after 1886, who would die before her, surviving his own parent, and leaving children. The latter

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would then take as purchasers under the terms of the deed and, should Mrs. Hewit survive all her children and grandchildren, might receive the entire estate. As they would not be the children of a person in being when the deed was delivered, these terms could not, in the event supposed, be given legal effect; and the possibility of such a result invalidates the whole conveyance. *Leake* v. *Watson*, 60 Conn. 498, 512.

If it can be regarded as a covenant to stand seized to uses or a declaration of trust, the equitable interest derivable from it would arise in favor either of Mrs. Hewit as the party contracted with, or of certain of her descendants, as the parties in whose behalf the contract was made. The contract was for the creation of an estate which the statute made it impossible to create, and for nothing else. The trust was therefore for an illegal purpose, and void from the beginning.

It is unnecessary to consider any other of the numerous objections urged against the validity of the deed, as that founded on the statute of perpetuities is decisive.

The Superior Court is advised that the deed of August 18th, 1886, was void *ab initio*, and that the New York, New Haven and Hartford Railroad Company has the full legal and equitable title to the land in question.

In this opinion the other judges concurred.

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Rose McCarrick *vs.* Patrick J. Kealy.

Third Judicial District, Bridgeport, April Term, 1898. Andrews, C. J., Torrance, Baldwin, Hamersley and Hall, Js.

In an action to recover damages for personal injuries caused by the bite of a dog, evidence of the declaration of the plaintiff that she had been bitten by the defendant's dog, made to her mother within five minutes of the injury, is but a narrative of a past event and inadmissible as part of the *res gestæ*.

It is not necessary to the institution or prosecution of a suit by *prochein*

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ami, that the infant should have authorized or consented to the action.

[Argued April 28th—decided June 24th, 1898.]

ACTION to recover damages for personal injuries claimed to have been caused by the defendant's dog, brought before a justice of the peace and thence by the defendant's appeal to the Court of Common Pleas for Fairfield County, and tried to the court, *Downs, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *Error and new trial granted.*

The plaintiff was described as a minor, who sued by Michael McCarrick, her natural guardian and next friend.

The trial court found the following facts: 1. On the 23d day of March, 1895, the defendant resided in the town of Fairfield, and was the owner and keeper of a large Newfoundland dog. 2. On said day the plaintiff, then of the age of sixteen years, in response to a message from the defendant's daughter conveyed to her by the defendant's son, John Kealy, then of the age of seven years, started from her parents' house to go across the fields to the defendant's house, accompanied by said John Kealy. 3. While passing through an open field the defendant's said dog attacked the plaintiff and bit her on the leg, just above the ankle. 4. The plaintiff immediately turned and went back to her parents' house, accompanied by the said John Kealy. 5. The time occupied by the plaintiff in going from the point where she was bitten to her parents' house, was less than five minutes. 6. Upon cross-examination she testified that upon reaching her parents' house and as she was entering the door thereof, she said to her mother in the presence and hearing of said John Kealy and a boy named Charles Stillson, "Kealy's dog bit me," and immediately proceeded to show her mother the wound. 7. The defendant claimed, and by cross-examination of the plaintiff (and subsequently by direct evidence) endeavored to show, that said dog did not bite the plaintiff, but that she had injured her leg by falling, while said dog was

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running toward her in said field. 8. Said Charles Stillson was subsequently called as one of the plaintiff's witnesses, and testified that he saw the plaintiff coming out of the field opposite her parents' house, crying, and accompanied by said John Kealy; that he, the witness, met her at the door and followed her into the house. 9. The witness was then asked what, if anything, he heard her say at the time she entered the house, in reference to her leg, and answered, "Nothing, only that the dog bit her." To the admission of this evidence the defendant objected. The plaintiff claimed said evidence as a part of the *res gestæ*. The court admitted said evidence, and the defendant duly excepted. 10. Said John Kealy, having been called as a witness for the defendant, contradicted the plaintiff as to his having been with her when she was going through said field toward the defendant's house. 11. Upon cross-examination, without objection from the defendant, he corroborated said Charles Stillson, as to the plaintiff having told her mother that said dog had bitten her. 12. There was no eyewitness to the encounter between the plaintiff and said dog, except said John Kealy. 13. The plaintiff testified that she had no knowledge that her father, Michael McCarrick, intended to institute a suit for the recovery of damages for her personal injuries, and that said action had been instituted without her knowledge. 14. No other evidence was offered upon this subject, and the court finds that said suit was instituted in plaintiff's name by her father, without her knowledge or request.

The errors assigned in the appeal are the rulings of the court in admitting the evidence of the declarations of the plaintiff, Rose McCarrick, and in deciding that plaintiff was entitled to a judgment notwithstanding the action was instituted without the knowledge or consent of the minor.

Stiles Judson, Jr., for the appellant (defendant).

Elmore S. Banks, for the appellee (plaintiff).

HALL, J. The decision of this case in the trial court depended upon the question of fact whether the plaintiff was

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bitten by the defendant's dog, or was injured, as the defendant claimed, by a fall while she was running in the field. The plaintiff was the only witness who testified that she was bitten by the dog. What evidence was introduced by the defendant in support of his contention does not appear from the record before us.

As a part of the *res gestæ*, and against the defendant's objection, the court admitted evidence of the declaration of the plaintiff, made to her mother, within five minutes from the time she was injured, and as, crying, she was entering her parents' house, that Kealy's dog had bitten her. Proof of the fact that she was crying, or complaining of pain, would have been admissible to show that she was then suffering, but not her statement of the cause of the pain. To render such a declaration admissible as a part of the *res gestæ* it must characterize or explain some material act or occurrence which it accompanies. The *res gestæ*, the occurrence, which was material, was the act by which the plaintiff was injured. Her declarations made while the injuries were being inflicted, were a part of that occurrence, and if they characterized or explained it would have been admissible. If not made during the continuance of the act, but after the act by which she was injured had been completed, they were but a narrative of a past event; and evidence of such declarations was objectionable as hearsay. 1 Greenl. on Ev. § 108; *Enos* v. *Tuttle*, 3 Conn. 247, 250; *Noyes* v. *Ward*, 19 id. 250, 268; *Ford* v. *Haskell*, 32 id. 489, 492; *Rockwell* v. *Taylor*, 41 id. 55, 59. The same principle has been enunciated in many other decisions in this State.

The declaration which the court permitted to be proved, was not made while the injury was being inflicted upon the plaintiff, but after that act had been entirely completed, and after she had left the field where she was injured and was entering her parents' house. The only act which this declaration could be said to explain, was the immaterial one which it accompanied, of her returning to her parents' house, crying.

But it is said by the plaintiff that the defendant was not

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harmed by the ruling of the court admitting the testimony of the witness Stillson, even if such ruling was erroneous, as both the plaintiff and the witness John Kealy testified without objection to the same declaration. There is much force in this claim. The mere fact of an erroneous ruling in the admission of evidence, does not entitle a party, as of right, to a new trial. A majority of the court, however, think that in this case the inadmissible evidence probably influenced the decision of the trial court.

The fact that this action was commenced by the *prochein ami* without the previous request or knowledge of the plaintiff, is immaterial. If the *prochein ami* could only prosecute the action by direction of the infant, her subsequent knowledge of the pendency of the suit and apparent acquiescence in its prosecution, furnished sufficient evidence of a ratification of his act. But it is not necessary that the *prochein ami* should have received authority from the infant, to enable him to sue in her name. The law which permits her to sue and appear only by her guardian or next friend, regards her at all times during her infancy as without sufficient knowledge and experience to properly decide when or how an action should be prosecuted for her benefit. "The law knows no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of his attaining his majority." *Morgan* v. *Thorne*, 7 M. & W. *400, *408. The *prochein ami* is regarded as an officer of the court by which, by statute in England, he was originally appointed. It is his duty to care for the interests of the infant in the institution and conduct of suits for his benefit, his power and responsibility in the performance of that duty being similar to that of guardians. Under our practice no previous appointment by the court is required, and the *prochein ami* named in the writ is permitted to appear and prosecute in the infant's name, though if he is not a proper person or fails to properly discharge his duties, the court may remove him and appoint another person in his place. Tyler on Inf. & Cov.

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§ 136; *Apthorp* v. *Backus*, Kirby, 407, 411; *Judson* v. *Blanchard*, 3 Conn. 579, 584.

There was error in the ruling of the court in admitting the testimony of the witness Stillson, objected to, and a new trial is granted.

In this opinion the other judges concurred.

AUSTIN B. FULLER ET UX. *vs.* THE METROPOLIAN LIFE INSURANCE COMPANY OF NEW YORK.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The defendant, a life insurance company, issued certain participating tontine endowment policies upon the "reserve dividend plan." *Held* that the meaning of the expression quoted, and the nature and extent of the obligations assumed by the company under the terms and conditions of its policies, were questions of law, and could not be concluded by any finding of fact by the trial court.

The policies in question, most of which were for a term of ten years, provided among other things, that at the end of the stipulated period the defendant would pay each of the persistent and surviving policy-holders his equitable proportion of the reserve dividend fund in cash; that an equitable surrender value would be allowed only at such time as a dividend might, by the terms of the policy, be due and payable; and that no policy should be entitled to share in the dividend surplus until the expiration of its term, or until the end of a reserve dividend period. This method of disposing of the surplus the policy termed the "reserve dividend plan." The plaintiffs contended that by the terms of the policies the defendant incurred certain fixed liabilities, payable to the surviving policy-holders of the class at the end of the stipulated period, the amount of which equalled the sum of the usual yearly dividends and the total legal reserves on lapsed policies, increased by compound interest and undiminished by losses, death claims or expenses. *Held:*

1. That this claim could not be supported, whether the policies were construed alone or in the light of a canvassing pamphlet used by the defendant and entitled "Key to the Reserve Dividend Plan;" that the obligation assumed by the company was the distribution in cash to its surviving policy-holders of the surplus on hand at the

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end of the class period, after having paid the cost of insurance, the expenses of management chargeable to these policies, and providing for the future cost of insurance on continuing policies. (*Two judges dissenting.*)

2. That if the contention of the plaintiffs were adopted, the insurance contracts would become mere mutual wagers upon the chances of life, without any element of protection, and consequently void. (*Two judges dissenting.*)

It is one of the fundamental conditions of mutual insurance that dividends must be derived from the overpayments of policy-holders, and that there can be no dividend, annual or otherwise, unless at the time there is a surplus in the hands of the company.

While experts may be called to define terms of art and, when necessary, to explain the principles of their science, they cannot be permitted to instruct the court as to the meaning and legal interpretation of a written instrument, or to give their opinion thereon.

It is within the discretion of this court to set aside a judgment founded upon inadmissible evidence, notwithstanding it appears from the record that a new trial cannot legally produce a different result.

Great prolixity in the assignment of alleged errors in an appeal is unjustifiable.

[Argued April 19th—decided July 26th, 1898.]

SUIT for a cancellation of certain receipts given to the defendant, for an accounting, and for damages, brought to the Superior Court in New Haven County and tried to the court, *Shumway, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiffs for alleged errors in the rulings of the court. *Error and judgment set aside.*

The complaint contains forty-one counts. Each count sets up a different policy of insurance, but they are all alike in other respects. The first count is as follows: "1. On October 26th, 1872, the defendant issued to John S. Follansbee, of Bridgeport, Connecticut, a policy of insurance under the seal of the defendant, on his life, for the benefit of his wife, Eunice R. Follansbee, for a sum of money exceeding one thousand dollars. 2. The plaintiffs are unable to state the amount of said policy, or to annex a copy of the same to this count because, as is hereafter stated, said policy has been delivered to the defendant, and is now in its possession. 3. Said policy of insurance was duly signed, executed by the proper officers of the defendant, and was in all respects a

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valid and binding contract between the defendant and said John S. Follansbee and Eunice R. Follansbee. 4. Among other promises and agreements contained in said policy there was the following agreement, to wit: 'This policy is issued and accepted by the assured upon the following express conditions and agreements: At the request of the assured this policy is issued upon the reserve dividend plan; and the said company agrees that should the premiums be paid as herein stipulated for ten full years from date hereof, and that should the life insured survive said period of ten full years, said company will pay to the designee of this policy at the expiration of said period of ten years its equitable proportion of the reserve dividend fund in cash, and the same to be receipted for to said company.' 5. Said reserve dividend plan, referred to in the preceding paragraph, is set forth and expressed on pages 10 and 11 of a certain book entitled 'Key to Reserve Dividend Plan,' which book is hereto annexed and marked Exhibit A. Said reserve dividend plan, as therein stated, was originated by one William P. Stewart, who was the sometime defendant's actuary prior to the issuing of any of the policies stated in this complaint, and in the form as stated on pages 10 and 11 of this book had been adopted by the defendant prior to the issue of any of such policies, which plan, as expressed by said Stewart, and adopted by the defendant, was as follows: 'All who take policies of any denomination or character within the year form a class, which is treated by the company as a distinct body for ten years. Every year forms a separate class, and all are known by the year in which they terminate, as the class of 1880, 1881, etc. Policies issued in this way, like all other policies, are paid out of the general fund of the company when becoming a claim by death or limitation, and not, as sometimes supposed, out of the class fund. The company in issuing any policy guarantee two things: the amount insured, according to its terms, and an equitable share in all the surplus and earnings. The amount insured they pay after it becomes a claim. The surplus they divide by way of a cash dividend at the end of every year. The reserve

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policies, however, in forming a class, stipulate among themselves that all the dividends allowed upon their policies for ten years shall be retained by the company, invested at the average rate of interest obtained upon their investments, and finally divided at the close of the ten years among the living members only. It is further stipulated that in case any member fails to keep his policy in force for the ten years he shall forfeit his reserve for the benefit of his class, which sum shall be kept at interest by the company, and divided in like manner. It follows, then, that for every class formed a fund will accumulate from five sources, as follows: 1. From the ordinary dividends as allowed by the company, accumulated upon existing policies. 2. From the accumulated dividends bequeathed to the class by dying members. 3. From the accumulated dividends forfeited to the class by retiring members. 4. From the reserves of all policies lapsing before the close of the class. 5. From the addition of compound interest. It follows, then, that the existing members at the close of the class will get, *besides receiving* all the ordinary dividends earned by their policies, more or less from all the last four sources. It is plain, therefore, that the dividend to the existing member at the close of the class *must be considerably larger than the dividend accumulating in the ordinary way.* Substantially what may be expected in reason this work is designed to show. It will be well to remember: that policies lapsing in one class do not benefit any other; that the expenses and death claims are paid out of the general fund of the company, and not charged to the class fund; that the lapses among ordinary policies benefit all policies alike; a partial indemnity to the reserve class for their greater vitality; that each class secures the investment of its funds at the best rate of interest available with safety, without any charge for investing it, as the expenses of the company are borne in an equitable manner by the policy-holders in general; that the dividend at the close of the class is paid in cash, and no reversionary additions allowed; that at close of one class, unless the policy-holder signifies his desire to enter the new class then forming, he will be

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come as one of the ordinary members of the company, receiving the dividend at end of every year, and a surrender value in case of lapse.' 5½. Between 1869 and 1872 the foregoing plan became well known to the public as the reserve dividend plan of insurance, and was known to the public by the name of the reserve dividend plan. In August, 1872, the defendant under its corporate seal agreed with William P. Stewart that the defendant would use the plan for five ensuing years, and at once thereafter the defendant adopted and used it, and announced it to the public as one of the distinctive plans of defendant, owned and used by it alone. In September, 1872, defendant, by writing, under its corporate seal, appointed Josiah N. Bacon, of New Haven, its general agent to canvass and procure applications for insurance on the lives of individuals, and to appoint and educate subagents; and in September, 1872, the defendant in writing, under its corporate seal, appointed Sherwood Sterling its general agent to canvass and procure applications for insurance on lives of individuals, and to appoint and educate subagents. Thereafter, and in September, 1872, the defendant, by John R. Hegeman, vice-president of defendant, and William P. Stewart, actuary of defendant, delivered to Josiah N. Bacon, and also delivered to Sherwood Sterling, copies of the said book, entitled 'Key to Reserve Dividend Plan,' and verbally instructed each of them to obtain insurance upon that plan, and to use those books to explain the said plan to applicants for insurance. Pursuant to these instructions said Josiah N. Bacon and said Sherwood Sterling represented and explained to each of the persons mentioned in the complaint, that the reserve dividend plan was the plan as stated in the fifth paragraph of the complaint, and exhibited to them copies of the said 'Key to the Reserve Dividend Plan,' and read to such persons pages 10 and 11 of said book, and declared to such persons that the book described the reserve dividend plan practiced by the defendant. Whereupon the persons mentioned in the complaint, upon the faith of the book so exhibited to them and the declarations of Bacon and Sterling that it represented the reserve dividend plan of the defend-

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ant, and of their representations and explanations as to said reserve dividend plan, accepted said policies from the defendant, and paid premiums thereon for ten years to defendant, without notice of any other reserve dividend plan than as above stated. 6. The plaintiffs state upon information and belief that in the year 1872 many other persons, to wit, ten thousand, took out policies of life insurance on their respective lives, in varying amounts, from the defendant, under said reserve dividend plan. The policies in each case contained the agreement set forth in paragraph 4 of this count; and all such policy-holders formed a class known as the class of 1882. 7. The defendant has upon its books the names of all the policy-holders insured by the defendant on the reserve dividend plan, and the several amounts of said policies, and the payments thereon, and the plaintiffs know of but a few of the names of said policy-holders, which are set forth in this complaint, and do not know the amounts for which said policies were issued, nor the payments made thereon. 8. Many of the members of said class of said policy-holders allowed their policies to lapse during the said class period of ten years by reason of the non-performance on their part of the stipulations of said policies, but after payment of one or several premiums upon their respective policies; a few of said policy-holders died before the expiration of said period of ten years; and a few of said policy-holders, including said John S. Follansbee and Eunice R. Follansbee, maintained and kept their policies in force during the whole of the period of said ten years. 9. The books of the defendant will show who of said policy-holders died or allowed their policies to lapse, or kept them in force during said period of ten years. 10. During said period of ten years the defendant received large sums of money, amounting to several hundred thousand dollars, from said policy-holders, by way of premiums paid on their respective policies. Dividends were earned on said policies; substantially 50 per cent. of the premiums paid on each policy was held by the defendant as the reserve on said policy; and the defendant should have kept the class fund of said policy-holders invested, according to the terms

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of said plan as before stated, and should have rendered to the policy-holders whose policies were in force at the termination of said class period a just and correct account of said class fund. 11. At the close of said class period, to wit, on the day of , 1882, the defendant by a letter which it wrote informed said John S. Follansbee and Eunice R. Follansbee that their proportion of the said class fund to which they were entitled according to said reserve dividend plan on their said policy, was the sum of dollars; and the defendant in said letter requested a return of said letter to the defendant, and the same is now in the possession of the defendant. 12. Said John S. Follansbee and Eunice R. Follansbee did thereupon return said letter to the defendant, and therefore the plaintiffs are unable to state the exact amount which the defendant so represented was their proportionate share of said class fund. 13. Said John S. Follansbee and Eunice R. Follansbee on the receipt of said letter from the defendant had no knowledge or information as to whether the amount which the defendant so represented as their true proportion of said class fund was such true proportion, or not. The defendant had always the exclusive charge of said class fund, and at the time of sending said letter knew and had the exclusive knowledge as to what was and should have been the just and true amount of such class fund, and knew that the amount stated in said letter was much less than the true amount thereof. 14. Said John S. Follansbee and Eunice R. Follansbee believed at the time of receiving said letter that the amount therein stated as their just proportion of said class fund was the just and true amount thereof; and in reliance upon said belief they returned said letter to the defendant, and received from the defendant the amount as stated in said letter to them as their proportion of said class fund, and also as the entire sum due to them from other provisions of said policy, and thereupon executed and delivered to the defendant a receipt for the sum so received, and returned to the defendant the original of said policy of insurance; and they have now no copy of said letter, receipt, or policy of insurance. 15. On the day

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of , 1889, said John S. Follansbee and Eunice R. Follansbee learned for the first time that the amount which had been so stated to them by the defendant in said letter, as aforesaid, as their true proportion of said class fund, was not the true and just amount thereof; but that their true and just proportion of said class fund would and did exceed the amount stated in said letter by several times, to wit, more than five times the amount so stated, and that the proportion of said class fund really due to them exceeded the amount paid them by the sum of more than one thousand dollars. 16. The defendant, in stating to them in said letter their proportion of said class fund, fraudulently concealed from them the truth concerning the real amount of said class fund, and of their just and true proportion thereof, in order to cheat and defraud them. 17. On the day of , 1889, the said John S. Follansbee and Eunice R. Follansbee for a valuable consideration assigned to Harriet A. Fuller, the plaintiff, all of their claims and the claims of each of them against the defendant, and she is now the equitable and *bona fide* holder and owner thereof. The assignment was as follows: 'For one dollar and other good considerations we, John S. Follansbee and Eunice R. Follansbee, do hereby sell, set over, transfer, and assign unto Harriett A. Fuller, of New Haven, Conn., all the claims, demands, and causes of action which we or either of us have or may have against The Metropolitan Life Insurance Company of New York, N. Y. Witness our hands and seals, this day of 1889. New Haven, Conn. John S. Follansbee [L. S.]. Eunice R. Follansbee [L. S.].' The consideration therefor was expressed in the instrument executed by A. B. Fuller and delivered to the said Follansbees, as follows: 'Whereas, John S. Follansbee and Eunice R. Follansbee have this day assigned to Harriet A. Fuller, wife of Austin B. Fuller, of New Haven, Conn., a claim against The Metropolitan Life Insurance Company of New York, with the expectation that said claim will be prosecuted against said company: This agreement witnesses that the said assignment is made upon the following understanding, viz: Said A. B. Fuller is to employ attorneys and

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counsel for the purpose of prosecuting said claim in the name of said Fullers, and without any liability on the part of said Follansbees to pay the expenses, or any part thereof. If no recovery is had the said Follansbees are not to make any claim against said Fullers, or either of them. But if the suit results in a judgment and recovery for the plaintiff, then said A. B. Fuller will pay to John S. and Eunice R. Follansbee one half of such sum as remains to him, after paying lawyers and other expenses. If said Fullers find it advisable to give up the attempt to prosecute the claim, then the right is reserved to re-assign the said claim to former holder, whereupon their liability under this agreement will then cease. [Signed] A. B. Fuller. New Haven, Conn., 1889.' 18. The defendant has never paid to said plaintiff Harriet A. Fuller, nor to said John S. Follansbee, or Eunice R. Follansbee any sum out of said class fund, or upon said reserve dividend plan, other than as above stated. 19. Neither the plaintiffs nor said John S. Follansbee or Eunice R. Follansbee have any knowledge or information by which they can state to this court who constituted the class formed in the year 1872; nor the amount of the policies belonging to said class; nor the amount of the premiums paid thereon; nor the amount of the dividends earned thereon; nor the amount or number of said policies that became lapsed during the period of said ten years; nor the amount of the reserve on any of the said policies; nor the several times when any of the said policies became lapsed; but all such knowledge is exclusively with the defendant, and is to be found on the books of the defendant whereon were kept entries concerning all such matters."

The plaintiffs claimed, by way of equitable relief, a cancellation of said receipts, an accounting and judgment for the amount found due thereon; and $100,000 damages.

The policy of insurance referred to in the first count, is as follows:

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"METROPOLITAN

No. 27,523. $2,000.

AGE, 43. PREMIUM, $70.10.

LIFE INSURANCE COMPANY OF THE CITY OF NEW YORK.

"This policy witnesseth, that The Metropolitan Life Insurance Company in consideration of the representations made to them in the application for this policy, and of the sum of seventy dollars and ten cents, to them duly paid by the assured, Eunice R. Follansbee, of Bridgeport, in the County of Fairfield and State of Conn., and of the annual payment of a like amount to be paid on or before the first day of November in every year during the continuance of this policy, until she shall have paid ten full years' premiums, do insure the life of John S. Follansbee, of Bridgeport, in the County of Fairfield and State of Connecticut, in the amount of two thousand dollars for the term of ten years, ending with the first day of November, 1882. And the said company do hereby promise and agree that should the person whose life is hereby insured die previous to the date last mentioned the said amount shall be payable to the assured aforesaid, her executors, administrators, or assigns, in ninety days after due notice and satisfactory proof of the death of the said insured, the balance of the year's premiums, if any, being first deducted therefrom. And the said company do further agree that should the person whose life is hereby insured survive the full term of years hereinbefore described they will pay the owner of this policy the reserve endowment of the same, on the day following the date last mentioned, as calculated by the actuary of the said company, being the sum of three hundred and thirty-seven dollars and ninety-eight cents, provided the stipulations, terms, and conditions under which this policy is issued shall have been observed by the party whose life is hereby insured, and provided this policy shall have been maintained in full force and effect by the payment of all premiums falling due thereon, up to and including the date mentioned for the last payment thereof; otherwise, this agreement to become and be null, void, and of no effect. This policy is issued and accepted by the

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assured upon the following express conditions and agreements: 1st. At the request of the assured this policy is issued upon the reserve dividend plan; and the said company agree that should the premiums be paid as herein stipulated for ten full years from the date hereof, and that should the life insured survive said period of ten full years, that said company will pay to the owners of this policy at the expiration of said period of ten years its equitable proportion of the reserve dividend fund in cash, the same to be receipted for to said company. 2d. At the close of any reserve dividend period the owners of this policy have the option to continue it until matured by its terms, either for reserve dividend periods of five or ten years, or to receive its equitable proportion of said company's dividend surplus thereafter annually. 3d. The reserve dividend when declared upon this policy, if not withdrawn in cash, may be exhausted in payment of future premiums, either as a temporary or reserve annuity, or continued with said company as a fund, drawing the average rate of interest earned, against which to charge future premiums as they fall due. 4th. An equitable surrender value will be allowed in purchase of this policy only at such time as a dividend may be due and payable upon it by its terms. 5th. This policy shall not be entitled to any share in the dividend surplus of said company other than at such times and after the manner and upon the conditions as hereinbefore described in sections first and second of this paragraph. 6th. At the close of the period limiting the insurance under this policy the policy-holder has the option of continuing it for any further designated period, upon payment of the same premium, receiving a pledge of the increased endowment for such future period, providing said policy-holder shall furnish the company with satisfactory proof of health, and continue with said company the reserve endowment value hereinbefore specified. 7th. *Permission is hereby given* to the person whose life is insured at any time to make a voyage to Europe by steamer or a first-class packet ship, to travel while there in good conveyances, and to reside in any part thereof north of 42 degrees of north latitude, and west of 30 degrees east

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longitude, and also to return in a like manner. It is however mutually understood and agreed that the said person is not insured against death in or by any war, or by any risk, casualty, or consequence of any war at or in any place where he may be while so traveling or residing: provided always that in case the said person whose life is insured as above shall at any time during the continuance of this policy without the consent of The Metropolitan Life Insurance Company previously obtained in writing sojourn or reside for a longer period than thirty days in any one year, commencing at the time of his arrival, in any part of the western hemisphere lying between the tropics, or of the eastern hemisphere, between the 36th parallel north and the tropic of Capricorn; or shall enter upon a voyage upon the high seas, except as hereinbefore mentioned; or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances; or in working or managing a steam engine, or a circular saw, in any capacity; or as a mariner, engineer, fireman, conductor, or laborer in any capacity, upon service on any sea, sound, inlet, river, lake, or railroad; or enter any military or naval service whatsoever (except into the militia when not in actual service), without the consent of this company previously given in writing, in each or either of the foregoing cases; or if he shall die by his own hand or act, or in, or in consequence of, a duel, or of the violation of the laws of any nation, state, or province; or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void. 8th. The said premiums shall be paid on or before the days above mentioned for the payment thereof at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to the company's agents, when they produce receipts signed by the president or secretary; and, in default thereof, then, in every such case, the company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and

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determine. Nor shall this policy although delivered take effect or be in force until the whole amount of the first premium is actually paid in the lawful currency of this country. No officer or agent of this company has power or authority to deliver this policy until such actual payment, nor to waive the actual payment of said premium on the delivery of this policy. 9th. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to this company. 10th. If this policy should be assigned or held as security written notice shall be given to the company, and due proof of interest produced with the proofs of death. 11th. This policy shall be incontestable for any errors or omissions contained in the application not affecting the age, health, or family history of the insured. 12th. Grace will be allowed on the payment of premiums on this policy of as many months (not exceeding six) as shall be equal to the number of complete years during which this policy shall have been in force, the policy-holder using these periods of grace being charged legal interest for such time.

"In witness whereof the said Metropolitan Life Insurance Company have by their president and secretary signed and delivered this contract at the City of New York, this twenty-sixth day of October, one thousand eight hundred and seventy-two.

"JOSEPH F. KNAPP, *President.*

"ROBT. A. GRANNISS, *Secretary.*

"Countersigned this 29th day of October, 1872.

"SHERWOOD STERLING, *Gen'l Agent.*

"Reserve Endowment, August, 1872.

"No person except the president or secretary of the company is authorized to make, alter, or discharge contracts, or to waive forfeitures."

On the back of the three policies referred to in counts 17, 19 and 27, there was printed an advertisement or notice containing regulations in respect to payment of premiums and obtaining permission to make a sea voyage, and also the fol-

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lowing: "This policy is placed in the reserve dividend class of 1873–83, the credits to the fund of which shall be made at the close of each calendar year, until the completion of ten full years from the date hereof; such credits to be the total gains from the following sources, viz: 1st. The surplus overpayments on all policies surviving said class period. (*Note.* Overpayments of premiums arise from a larger rate of interest earned than anticipated in the premium charges, a lower ratio of mortality experienced than expected, and a lighter percentage of expenses than provided for in calculating the annual payments.) 2d. The surplus overpayments on all policies becoming a claim by death before the completion of said period. 3d. The surplus overpayments on all policies lapsing by their terms before the completion of said period. 4th. The total reserve on all policies lapsing before the completion of said period. (*Note.* The reserve shall be accumulated in all respects as for a whole life policy for a like amount of insurance as herewithin written, to be calculated on the assumptions adopted by the State insurance department for determining such values.) 5th. The interest upon such credits at the average rate earned by the company."

The material parts of the judgment rendered for the defendant, are as follows: "The 'reserve dividend plan' treated those taking policies upon that plan during any calendar year as a class, and postponed the usual distribution of profits or surplus among such class mutual policy-holders to the end of an agreed initial tontine period, to wit, ten years from the date of the several policies, and then at the expiration of said ten year tontine period dividing among the several surviving and persisting owners, holders, and designees of the policies in the several classes, their equitable proportion of the class reserve dividend fund or divisible surplus; the policy-holders in any class dying or lapsing or forfeiting their policies during said tontine period of ten years thereby forfeiting their contingent share in any such divisible surplus or profit. At the end of such initial ten year tontine period the defendant paid in each instance to the several

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policy-holders, owners, and designees of said policies, their equitable proportion of the class reserve dividend fund or divisible surplus, in cash, and in each instance wherein the insurance term mentioned in the policy was a ten year term, the defendant at the end of said ten years also paid to the said holders, owners, and designees of said several policies, the amount of said 'reserve endowment' in cash; and in those cases wherein the insurance term mentioned in the policy was for a longer term than ten years, the defendant upon the request of said several owners, holders, and designees of said policies, at the end of said ten years also paid to them, severally, an equitable surrender value for said policies in cash; and thereupon, in consideration of such payments of said 'reserve endowment' and such equitable proportion of the reserve dividend fund or divisible surplus and of said surrender value by the defendant to the said several owners, holders, and designees of said policies, said several owners, holders, and designees surrendered said policies to the defendant, and executed and delivered to said defendant a receipt in full, and release and discharge. . .

"The court also finds that the plaintiffs never were the equitable or *bona fide* holders or owners, and neither of them ever was or is the equitable and *bona fide* holder or owner, of any of the alleged choses in action which are the subject of this action.

"Whereupon it is considered, determined and adjudged that the said policy contracts were, severally, as above stated and found, and that the defendant has in each instance fully complied with and discharged the same, and that the plaintiffs and neither of them are, or ever were, the equitable or *bona fide* owners or holders of any such claimed chose or right of action against the defendant, and that in respect to the alleged causes of action stated in the said complaint the plaintiffs have no right or cause of action against the defendant."

In the finding the trial judge details the facts upon which the judgment is based, and among others he finds "as a matter of fact from the testimony and evidence in this case, that

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before and at the date of the policies in question this 'reserve dividend plan' of insurance had the above meaning," *i. e.* that stated in the judgment. The finding also details at great length numerous rulings on evidence.

The appeal assigns error in the finding and rulings of the court as to the meaning of the "reserve dividend plan," and a great number of errors in rulings upon evidence.

**Talcott H. Russell* and *George E. Beers*, with whom was *E. P. Arvine*, for the appellants (plaintiffs).

**Henry C. Robinson* and *Henry Stoddard*, for the appellee (defendant).

HAMERSLEY, J. In the years 1872, '73 and '74, the defendant issued a number of participating policies, providing for a dividend upon the policies of each year at the end of ten years. All were term, life and endowment policies for differing periods. Forty-one of these are mentioned in the complaint, one in each count. In the case of each policy mentioned the defendant, at the expiration of ten years from its date, paid the holder the amount promised as an endowment, or, where the policy was for a longer term than ten years, purchased the policy by the payment of its surrender value. The defendant also declared upon all these policies a dividend, and paid the amount to each holder. The assured and insured under each policy gave to the defendant a release acknowledging the receipt of the payments so made, "in full payment and settlement and discharge of all claims and demands whatsoever." After the policies had been surrendered and the amounts due upon them thus satisfied, the plaintiffs obtained from the former owners of the policies assignments of all "claims, demands and causes of action" against the defendant; and relying upon these assignments have brought this action in their own names.

* It is impossible to give an adequate outline of the arguments contained in the extended briefs of counsel in the space that can be allotted to that purpose.

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There is no claim that the defendant has violated any direct promise of the policy. The plaintiffs seek, and seek only, to revise the methods by which the defendant ascertained the dividend it could properly declare and did declare on these policies. For this purpose the plaintiffs have brought their complaint in equity, claiming, first, a cancellation of the receipts on the charge of fraud, and second, an account. It is not necessary to go into the questions as to the remedy by account, the necessity of fraud to set aside the receipts, the validity of the assignments to the plaintiffs, and other matters which have been discussed. The fundamental question is the meaning of the policy of insurance, and the decision of that should end this litigation. The plaintiffs' counsel rightly claims that the meaning of the reserve dividend plan is "really the sole contest."

Upon the trial much evidence, documentary and oral, was received to explain the meaning of the policy. The plaintiffs rightly claim that it is a question of law not to be concluded by any finding of fact; and we think its meaning upon the point in controversy clearly appears from its language, read in the light of those settled and commonly known principles of insurance of which we may take judicial notice.

Life insurance is protection given to one person against the damage he may suffer through the death of another. A mere wager on the accident of death is void. In mutual life insurance the protection is furnished by the premiums paid by policy-holders. The duration of any particular life is the merest chance; but the average duration of life from any particular age approaches mathematical certainty. Hence it is possible to calculate the sum which, paid annually by a large number of insured, will satisfy the insurance on those who may die each year. It is the yearly death claims which constitute the cost of insurance that the premiums must pay. This cost for a young man is small, but increases each year until it becomes very large. To avoid the necessity of an increasing premium a uniform premium is calculated, which furnishes at first much more than enough to pay the cost of insurance, and later on is entirely insufficient for that pur-

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pose. So the portion of the premium not used for the early yearly cost is reserved for use when the premium will become insufficient; and is invested so that it may increase at compound interest. It follows that the portion of the premiums applied to pay the yearly cost gradually increases, and that the portion which has been reserved to make up the insufficiency of the premium to pay future cost increases with the aid of interest. The part of the premium intended to meet the cost of insurance, both current and future, is called the net premium; it is the sum paid yearly by each to furnish the stipulated protection for all. But the policy-holders must pay not only for the cost of insurance, but also for the expense of management; so to the net premium is added a sum deemed sufficient to pay expenses and provide for contingencies, which is called the loading. In this way the policy-holders pay the sum necessary for the cost of insurance and expense of management. The amount of the net premium is calculated upon the basis of certain tables of mortality and upon the assumption that the company will receive a certain rate of interest upon all its assets; and the amount of the loading is calculated upon a certain assumed rate of expense. Now it may happen that the rate of mortality experienced by the company is less, and the rate of interest actually received is greater, than that assumed, and that the ratio of actual expense is less. In such case the company has in reserve more than enough, with the anticipated annual premiums, to provide for future cost of insurance and management; it has a sum which is not needed for the purposes for which it was paid. This sum is called profits; it is in fact a surplus resulting from overpayments by policy-holders. This surplus is derived from money paid by the insured and received by the company for a particular purpose, *i. e.* providing for cost of insurance and expense of management. If not needed for that purpose, it should in equity be returned to the policy-holders. They do not, however, own it, or have any legal control over its distribution; part of it, indeed, is derived from contributions of policy-holders who are dead; but the equity is recognized and it is

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the duty of the company, when a surplus is ascertained, to return such portion as it does not deem proper to keep as a guaranty fund, to the existing policy-holders in equitable (*i. e.* as nearly as practicable) proportion to their overpayments or contributions. Such return of overpayments, whether in cash, or by application on future premiums, or by increase of the amount insured, is a dividend. This is the meaning of "dividend," and the only meaning it has or can have in connection with mutual insurance.

The surplus may also be increased through the failure of some to continue their policies. Where a policy thus lapses the company has in hand the accumulations of a portion of its premiums invested and held in reserve to supply the insufficiency of future premiums to pay future cost of insurance. (The amount thus held in reserve depends on the judgment of the company in calculating its premiums and the condition of its business, but the statute treats the company as legally insolvent unless its whole reserve is at least equal in amount to the reserve value of all the policies calculated according to a rule established by law. Some companies accumulate a reserve larger than that required by statute; none can have less and remain solvent.) By a lapse the company loses the future premiums, and may lose in other ways; but it is relieved from providing for future cost of insurance as to that policy and ordinarily, when the reserve fund is good, there is a considerable gain which may increase the surplus. Formerly, whatever gain there was went to increase the surplus; but latterly, in view of the fact that these overpayments are made to provide for future cost of insurance by a policy-holder who up to the time of lapse has theoretically paid his full share of the yearly cost and expenses, the equity of the lapsed policy-holder has prevailed over the equity of those who remain, and he is allowed an equitable portion of these overpayments, and this is called the surrender value of his policy. When a policy lapses the portions of prior premiums invested and held in reserve can no longer be applied to the purpose for which they were made, and, to the extent of the net gain by the

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lapse, become overpayments, and in equity should be returned to the holder of the lapsed policy, or to the surplus for the benefit of all. A dividend, therefore, is a distribution of existing overpayments resulting mainly from savings on the annual cost of insurance and expense of management, and in part from savings on the future cost of insurance, *i. e.* the net gain from lapsed policies.

The company is the absolute owner of its assets, and within the limits of honest dealing has complete control of the time and manner of declaring a dividend on its policies. This time and manner, however, may be controlled by law, by its charter, and by contract. But no contract can make a "dividend" anything but the return to policy-holders of funds derived from their premiums not used and not needed for the purpose for which they were paid. So no dividend can be made by a company until after a valuation of its assets and liabilities, showing an excess of assets over liabilities. Unless there is such excess of assets over liabilities, every payment in the company's hands is needed for the purpose for which it was made; there are no overpayments to be returned, and a dividend cannot legally be made. *De Peyster* v. *American Fire Ins. Co.*, 6 Paige Ch. 486, 488; *Scott* v. *Eagle Fire Co.*, 7 id. 198, 202; *Lexington Life, etc., Ins. Co.* v. *Page et al.*, 17 B. Monroe, 412, 440.

The policies in question insure a life for a term of years, and also agree to pay an endowment at the end of the term. The net premium for the life policy is calculated in one way and that for the endowment in another. A part of the net life premium is used to pay current cost of insurance, and a part is reserved for future cost. The whole net premium of the endowment is reserved to meet the final payment, there being no current cost of insurance. The endowment in these policies is fixed at such a sum that the life premium and endowment premium added together equal the premium for a whole life policy for the same amount of life insurance. The policies are participating, and contemplate the payment of an equitable surrender value in case of lapse. They make special provisions in respect to the distribution of the profits by

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way of dividend; and this controversy turns on the meaning of those provisions. Let us examine them.

In the first place the policy-holders stipulate and the company agrees that the dividend surplus in which all the policies issued in that policy year may be entitled to share, shall be apportioned and paid in cash to the surviving and persisting policy-holders at the end of ten full years. This is clearly stated in the first and fifth clauses of the conditions contained in the policy. Second, each policy-holder, by the stipulation in clause four, foregoes his right to an equitable surrender value during the dividend period, so that in case his policy lapses, the whole amount of payments on that policy held by the company in reserve, remains in its hands. Third, each policy-holder stipulates, in clause five, that any share of the dividend surplus which his policy might be entitled to during the dividend period, shall be apportioned among the surviving and persisting policy-holders. The other conditions are not especially pertinent to the disputed question. This disposition of the surplus the policy calls "the reserve dividend plan;" and it calls the fund accumulated through these stipulations of the policy-holders, "the reserve dividend fund."

The practical effect of these provisions is patent. The policies of each year constitute a class by themselves, and their contributions must be treated separately so far as consistent with the necessities and obligations of mutual insurance, in order to give effect to the provisions. The policies in force at the end of ten years will be entitled to the whole dividend fund, which may have been fed not only by the annual overpayments on their own policies increased by compound interest, but also by the overpayments of those who have died, made up to the time of death, and of those whose policies have lapsed, and by overpayments of holders of lapsed policies to the fund held in reserve to meet the future cost of insurance. As these policies stipulate that they shall receive no surrender value during the dividend period, the whole reserve or unexpended portion of the premium remains in the hands of the company, and the gains upon a lapse are

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not depleted, as in other cases, by payment of a surrender value. And this practical effect of the policy stipulations is advertised by the defendant in an indorsement printed on the back of some of the policies, which states that the credits to the reserve dividend will be, "the total gains from the following sources, viz: 1. The surplus overpayments on all policies surviving said class period. 2. The surplus overpayments on all policies becoming a claim by death before the completion of said period. 3. The surplus overpayments on all policies lapsing by their terms before the completion of said period. 4. The total reserve on all policies lapsing before the completion of said period. 5. The interest upon such credits at the average rate earned by the company." Under the first item is a note explaining how overpayments of premiums arise, *i. e.* from larger rate of interest, etc., but excluding the gains from lapsed policies, which are contributory to the fund representing overpayments as truly as the other matters named. The gains from lapsed policies are left to be stated as a separate credit; this, because no surrender value is paid according to the stipulation of the policies; so that upon lapse all payments made to provide for future cost of insurance and held in reserve for that purpose, remain in the hands of the company. The "gain from the total reserve on all policies lapsing," is therefore deemed of sufficient importance to be named as a separate credit, instead of being included under gains from overpayments of premiums, as it would have been except for the retention of surrender values. And a note under item four explains how the reserve, the whole of which remains in the hands of the company upon a lapse as a possible source of gain, is accumulated. The policy is a term life and endowment policy, insuring life for one amount and an endowment for another; but the reserve will be accumulated "as for a whole life policy for a like amount of insurance," calculated according to the rule adopted by the State insurance department. The total reserve on all lapsed policies is retained in the company's assets, and is a source of gain arising chiefly from the stipulations respecting surrender values.

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This advertisement is evidently framed for the purpose of presenting the practical effect of the policy in a way suggestive of the largest possibilities of gain. It is, however, another form of saying: "The premiums paid during ten years on all reserve dividend policies issued this year, will be improved at compound interest and applied to the payment of the cost of insurance and expenses of management chargeable to the policies; and at the end of ten years the surplus on hand, after providing for the future cost of insurance on continuing policies, will be apportioned by way of cash dividend to the policies then in force."

This is the plain meaning of the policy, by which the obligations of the company and the rights of the insured must be determined. It is the only meaning consistent with the terms of the policy and the fundamental condition of mutual insurance, that dividends must be derived from overpayments of policy-holders and that there can be no dividend, annual or decennial, unless at the time there is a surplus in the hands of the company.

The plaintiffs claim a widely different meaning, viz: "That the usual dividends and the total reserves on lapsed policies should have been credited to a fund yearly, that this sum should have been kept at interest and not resorted to for losses, death claims or expenses, and that it should have been divided at the end of the reserve dividend period among the survivors of the class."

So far as this claim relates to bookkeeping only, it is immaterial. The company may change its methods of entries and computation at any time. The essential feature is in the plaintiffs' claim that the policies did not simply provide for a decennial dividend, but that the defendant promised to incur certain fixed liabilities, and at the end of ten years to divide the amount of those liabilities.

A yearly dividend has its advantages: an uncertain equitable interest in a fluctuating fund is converted into legal ownership of a definite sum. A decennial dividend has its advantages: the rapidly increasing surplus is an additional guaranty against adverse experience of one or more years,

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and the share of the policy-holder accumulates at compound interest. But the advantages of the two dividends cannot be combined; the certain enjoyment of the annual is inconsistent with the uncertain possibilities of the decennial. A combination of immediate consumption with continued possession is impossible. The plaintiffs' claim that the company in providing for a decennial dividend promised to declare ten annual dividends, is baseless. It did not even *promise* a decennial dividend. Dividend implies surplus, and surplus is free; if mortgaged for liabilities it is not surplus. And the policy in express terms forbids an annual dividend. "This policy shall not be entitled to any share in the dividend surplus of said company other than at the expiration of ten full years from the date thereof." How is it possible to extract from these policies a promise to declare annual dividends, when every one of them explicitly excludes its right to any share in the surplus except at the end of ten years? It is true, however, that if the business of the company were prosperous during the ten years, the dividend then made would be equivalent to the usual dividends,—*i. e.* those that would have been made had annual dividends been provided for—kept at interest. Assuming that prosperity, the decennial dividend may properly be calculated in this way.

But the plaintiffs rely mainly on the other part of their claim, viz: that "the total reserves on lapsed policies should have been credited to a fund yearly;" meaning that the company promised that upon the lapsing of each policy during the dividend period, it would become the debtor of the class policy-holders for a sum equal to the reserve value of that policy, that it would pay compound interest upon this debt, and at the end of the period would pay over the whole amount. This claim is stated by the plaintiffs' counsel in various forms: "In no case (of lapse) did the obligation to keep up the reserve of the class policy-holder cease to be a liability of the company during the class period, only the payee was changed." And again: "Until it had provided for the payment of such reserves (including reserves on

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lapsed policies) it had no surplus fund; having no surplus fund it could not declare dividends."

Such a contract as this is unheard of. It is impossible of execution. It cannot be found in the policy, and is inconsistent with the terms of the policy. Indeed the plaintiffs do not claim to find such a contract in the policy. Their claim is that it may be inferred from the contents of a certain canvassing pamphlet entitled "Key to the Reserve Dividend Plan," written by one Stewart for the exclusive use of the agents of the Widows & Orphans Benefit Life Ins. Co., and that the plan of insurance contained in the defendant's policy is set forth and expressed on pages 10 and 11 of said book, and as so expressed had been adopted by the defendant prior to the issue of the policies. The trial court has found as a fact that this pamphlet was not adopted by the defendant. It was prepared and published for the exclusive use of the agents of the Widows & Orphans Co., and at the time the first of the policies in suit was issued that company was transacting business through its own agents. The pamphlet, after the manner of insurance literature, attacks the defendant and other companies named, as incapable of carrying on this plan of insurance, and attacks the standing of the defendant and other companies named. It seems hardly credible that the defendant in issuing these policies as its own peculiar plan of insurance, should have sanctioned the distribution and use of such a pamphlet of another company.

The plaintiffs, however, claim that upon the special facts found the adoption of this pamphlet is a necessary conclusion of law. For the purpose of this decision we will assume that the plaintiffs' claim is correct, and that the defendant did authorize the use of this pamphlet as an explanation of the plan of insurance contained in its policies. It must be remembered, however, that a book of this kind is not the policy, but is simply explanatory of the policy; it must be read in connection with the terms of the policy, and when its language may be construed as consistent with those terms, a different and inconsistent construction cannot be given. We think any fair construction of this pamphlet *is* consistent

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with the meaning of the policy as expressed in its language. It would be a waste of time to sift in detail the loose phraseology of this book covering some 120 pages, or to compare it with the language of companion books covering over 100 pages more, written by the same author, for the same purpose and at the same time, and clearly proper to be considered in ascertaining his meaning. The true meaning of the pamphlet appears with sufficient clearness in the extract from pages 10 and 11, on which the plaintiffs mainly rely. The author's comments on the Reserve Dividend Plan are contained in some thirty paragraphs placed under "catch" headings, without much reference to clearness or connection. Among these is "*A simple view of the reserve dividend plan.*" He says: "The company in issuing any policy guarantee two things: the amount insured according to its terms, and an equitable share in all the surplus and earnings. The amount insured they pay after it becomes a claim. The surplus they divide by way of a cash dividend at the end of every year." Here is a clear statement of the whole promise of the company in any policy. The death claim is a liability that must be paid. The dividend is an apportionment of surplus. This is true of the reserve policies as well as of all others. Wherein they differ is this: "The reserve policies, however, in forming a class, *stipulate among themselves* that all dividends allowed upon their policies for ten years, shall be retained by the company, invested at the average rate of interest obtained on their investments, and finally divided at the close of the ten years among the living members only." This stipulation is contained in the policy, as follows: "This policy shall not be entitled to any share in the dividend surplus of said company other than at" the end of ten years, when the dividend fund shall be divided among the policyholders then living. He goes on: "It is *further stipulated* that in case any member fails to keep his policy in force for the ten years he shall forfeit his reserve for the benefit of his class, which sum shall be kept at interest by the company and divided in like manner." This stipulation is contained in the policy, as follows: "An equitable surrender value

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will be allowed in purchase of this policy only at such time as a dividend may be due and payable upon it by its terms." A policy-holder could stipulate to forego the surrender value of his policy, but whatever of reserve there may be beyond this goes upon a lapse, by force of the insurance contract, to the free assets of the company; yet practically by force of this stipulation the whole amount held in reserve goes to those assets. The phrase "forfeits his reserve," etc., is accurate enough for a "simple view." Mr. Stewart goes on: "It follows then (follows from the stipulations of the policy-holders) that for every class formed a fund will accumulate from five sources, as follows:" (stating the sources substantially as stated on the policies).

The significance of this language lies in the fact that a "dividend" is defined as an equitable share in all the surplus and earnings; that the reserve policies differ from others only by reason of the stipulations contained in the policies themselves, and that the fund for the reserve dividend accumulates in a special way only by reason of these stipulations. This accumulation is the same as that mentioned on the policies, namely "the total gains" from all sources. And the final conclusion of Stewart is: "It is plain, therefore, that the dividend to the existing members at the close of the class must be considerably larger than the dividend accumulating in the ordinary way." The dividend to the existing members, fed from the five sources named, is an equitable share of the surplus; in this respect precisely like the dividend accumulating in the ordinary way, the only difference being that the surplus is liable to be considerably larger. This language, in connection with that which goes before, is conclusive that the "reserve dividend" Stewart is talking about is a "dividend"—an equitable share of surplus—and not a payment. This fundamental assumption that the reserve dividend is a "dividend" implying surplus and derived only from profits, runs through the whole book and fixes its meaning. He starts with a statement that the plan is a division of "profits." He states that it "differs from all others in that it recognizes the sources whence the surplus

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arises and returns to each contributor the exact amount contributed." Among these sources is the "gain from lapses," and it is "this surplus" which "is divided among the policy-holders in an equitable proportion." He calls special attention to the fact that this surplus accumulating for ten years serves as a sort of guaranty capital in addition to the re-insurance fund, and thus furnishes a "security beyond question" for the payment of the amounts insured. In the companion book, "Key to the Reserve Endowment Plan," he states that the reserve dividend is a "question of surplus, its accumulation and division;" and that "the reserve dividend is a question of profits only;" that the realization of profit depends on assumptions by way of estimate only; that the company does not guaranty profit and assumes no liability in respect to it. In the companion book prepared for the defendant, about the time it commenced this kind of insurance, he states the sources of the reserve dividend, as "the profits of favorable mortality, the savings in expense, the gain by interest and investments, and the profits from lapses." And in describing the characteristic provisions plainly expressed in the defendant's policy, he refers to their reserve dividend feature as "its guaranteed equitable participation in the company's surplus in periods elected by the policy-holder." The more carefully this book is examined, the more clearly this meaning appears. But it appears with sufficient certainty from the statements that are the foundation of "A simple view of the reserve dividend plan," on pages 10 and 11, viz.,—a dividend is an equitable share of surplus; the reserve policies contain certain stipulations between themselves, by which the share of those who die or whose policies lapse goes to increase the share of those who live and persist; the reserve dividend fund is the result of these stipulations; at the end of ten years a dividend, *i. e.* an apportionment of existing surplus, is made to existing policies. This is the substance of the whole book; the rest is ornamentation. There is some unfairness to the author, as well as a touch of the humorous, in treating a drummer's pamphlet which taxes the resources of fancy and exaggera-

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tion in indiscriminate praise of a general scheme of insurance, as the responsible explanation of the terms of a written contract.

Stewart says the persisting policy-holders are entitled to share in a surplus; the plaintiffs claim they are entitled to the payment of a debt. Stewart says the company promised to distribute what it has; the plaintiffs claim a further promise to pay a sum it has not. Whether we read these policies by themselves, or in connection with the "Key to the Reserve Dividend Plan," as an authorized explanation, the result is the same. There is no foundation for the plaintiffs' claim; and upon our interpretation of the policies they cannot maintain this action.

There is another view of these contracts that may be material. All that distinguishes ordinary life insurance from a wagering contract, is the theory of protection against damage that may be suffered through another's death. This protection may be purchased by the insured in behalf of his own family, or of those he sees fit to make his beneficiaries; it may be purchased by one on his own account where he may suffer damage from another's death by reason of kinship, the relation of creditor, or other insurable interest. But when this element of protection is entirely eliminated, the insurance is a wager and the contract is void. *Cronin* v. *Vermont Life Ins. Co.*, Supreme Court of R. I., 40 Atl. Rep. 497. In the present case the policy-holders stipulate between themselves that the surrender value of each policy lapsing, which represents payments made in behalf of the beneficiary, shall go to benefit other policy-holders living at a certain time, who are total strangers to the policy and the insured. This is a mutual wager upon the chances of life. There is no conceivable element of protection. The sole purpose of the bet is personal profit. It is the risk of what is due to each in the case of a lapse, for the chance of winning what is due to others. It is correctly described by the plaintiffs' counsel as "the chance to speculate on his chances of surviving the other members." On this ground these policies were urged upon the public, by appeals to the gambling instinct,

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claiming, as stated in the Stewart pamphlet, that "Risk is the condition of success." The only way of evading the invalidity of such a contract is by the claim that the policy-holders in fact wager nothing, that all payments of premiums belong to the company, including those applied to maintain a reserve, and the policy-holders are not entitled to any particular sum, but only to an equitable proportion of the excess of assets over liabilities at the time of dividend. We do not pass upon the sufficiency of this claim. But if the claim of the plaintiffs be true; if upon each lapse a sum equal in amount to the reserve value of the policy lapsing becomes a liability of the company which it must pay to the surviving policy-holders; then all doubt as to the gaming nature of the transaction vanishes. The pool thus created is composed of definite sums of money of which the company is stakeholder, under an agreement to divide these sums among the winners, who are to be determined by the chances of life. If, therefore, the plaintiffs could maintain their claim, the result would be the dismissal of their complaint. Courts of equity will not apportion the spoils of gamblers.

A number of assignments of error in rulings of the court are well taken. The most material occurred in the examination of experts, so-called. Mr. Whiting was asked in reference to the "Key to the Reserve Dividend Plan," being a book claimed as the defendant's authorized statement of the contract in dispute: "Is there anything in that book that requires, anything in that book, or in that plan of insurance, that requires that there should be constituted and set aside," etc.? In respect to the indorsement on some of the policies in suit, Mr. Whiting was asked: "I wish you would state a little at length your opinion in reference to that language, and the reasons which are at the bottom of it." And he was further asked, in reference to the indorsement, whether it was inconsistent with a printed statement of the defendant, in evidence, as to the accumulation of its dividend fund. Mr. Homans was asked in reference to the "Key to the Reserve Dividend Fund": "From what fund are the expenses

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and death claims made payable by the terms of that book?" And also: "Do you find anything in the text of that book, or in the illustrative tables, that indicates the existence of any general fund," etc.? He was asked the same questions about the indorsement that were put to Mr. Whiting. All these questions were admitted against the plaintiffs' objection, and exceptions were duly taken. Others of a similar character, not necessary to detail, were admitted.

This testimony was inadmissible. The meaning and legal effect of the policy and of the document claimed as referred to by the policy, was a question of law for the court. Experts may be called to define terms of art, to explain the principles of their science, where such principles are necessary to be understood, to state the condition and practice of their business, when material; but not to instruct the court as to the meaning of a contract. Sometimes a definition of a term or explanation of a principle may be decisive of the meaning of a document, but it is for the court to draw the conclusion; the opinion of any one else is immaterial. Here opinions were received as to the very point at issue in the case.

Ordinarily a new trial will not be granted on account of errors, where it appears from the record that a new trial cannot lawfully produce a different result. But this is a matter of discretion. In the present case the trial court seems to have found the meaning of the policy as a fact inferred from documentary and oral testimony. The opinions erroneously received from witnesses learned in insurance matters, must have been given weight, possibly controlling weight, in reaching the conclusion, which was the basis of the judgment. Under the circumstances of this case a majority of the court think our discretion should be exercised in setting aside a judgment so reached.

In a former appeal in this case the defendant assigned 167 errors; in the present appeal the plaintiff assigns 326 errors. There was no just ground in either appeal for such prolixity.

There is error and the judgment of the Superior Court is set aside.

In this opinion TORRANCE and HALL, Js., concurred.

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BALDWIN, J. (concurring in the judgment, but dissenting in part from the opinion). I cannot agree with the majority of the court in approving the construction given, by the judgment appealed from, to the contract contained in the policies in question.

The plaintiffs introduced in evidence a pamphlet entitled as follows:—

"New Plans of Insurance presented by the Metropolitan Life Insurance Company, 319 Broadway, New York, entitled Reserve Endowment and Reserve Dividend Plans, claiming advantages not hitherto offered. Originated and published by William P. Stewart, Actuary of the Metropolitan, and copyrighted by him in 1869.

"Entered according to Act of Congress in the year 1872 by the Metropolitan Life Insurance Company in the office of the Librarian of Congress at Washington."

It is found that William P. Stewart, prior to 1872 was the actuary of the Widows and Orphans Benefit Life Insurance Co., compiling and publishing while such, a pamphlet entitled a "Key to the Reserve Dividend Plan," etc., which was copyrighted in his name in 1871; and that in 1872 he became the actuary of the defendant under a contract by which he gave it the exclusive right until 1878 to use and practice the plan so copyrighted.

No other proof was offered that the defendant or any of its agents prepared the matter in the pamphlet of 1872, or had it copyrighted, except the fact of such copyright and the document itself. The plaintiffs asked the trial court to find as a fact that it was copyrighted by the company, and the refusal to comply with the request is assigned for error. It seems to me plain that it was error. *Hoyt* v. *Danbury*, 69 Conn. 341. The pamphlet served to throw light on a material point, and if its statements were indorsed and put forward by the defendant, they became thus entitled to great weight in determining the nature of the policy contracts in controversy. That it was copyrighted in the name of the defendant was *prima facie* evidence that it was so copyrighted by its authority, and there was nothing to abate from the force of that presumption.

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I am therefore of opinion that the pamphlet should have been taken as a cotemporaneous explanation by the defendant of the meaning of certain terms of art, used in its policies, namely, "Reserve Dividend Plan," and "Reserve Dividend Fund."

Three of the policies in suit bear an indorsement which also states what is to be credited to this fund. As these policies, in other respects, are identical with all the rest, I think that each of the whole number should be construed as if it bore a similar indorsement.

From these sources of information, and others to which allusion is made in the preceding opinion, it seems to me that the contract of the defendant was not that found by the Superior Court.

The defendant was a stock company. Its capital in 1872 was $200,000; in 1883, $500,000. Its means for meeting its obligations were therefore not limited to its premium receipts and the accumulations from them. It offered insurance upon the "participating" plan, under which dividends are annually declared from the surplus of the year's operations, if any there be, payable to all policy-holders, in proportion to the premiums received from them. It also offered insurance upon the "Reserve Dividend Plan." This was to tontine a number of participating policies for a fixed term of years, and instead of paying over the dividends which might be declared upon them, reserve payment until the end of the term, crediting interest meanwhile on the sums so reserved. But this was not all. In the words of the copyrighted pamphlet of 1872:—

"On the reserve dividend and reserve endowment plans a fund will accumulate from five sources, as follows: First. From the ordinary dividends, as allowed by the company, accumulated upon existing policies. Second. From the accumulated dividends bequeathed to the class by dying members. Third. From the accumulated dividends forfeited to the class by retiring members. Fourth. From the reserve of all policies lapsing before the close of the class. Fifth. From the addition of compound interest. It follows,

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then, that the existing members at the close of the class will get, besides receiving all the ordinary dividends earned by their policies, more or less from all the last four sources. It is plain, therefore, that the dividend to the existing members at the close of the class must be considerably larger than the dividends accumulated in the ordinary way."

One of the five sources of credit to the "Reserve Dividend Fund" was therefore "the reserve of all policies lapsing before the close of the class."

On a previous page of the same work we find another description of the "Reserve Dividend Plan," as follows:—

"The Reserve Dividend Plan contemplates the reserving for ten years of the usual dividends paid policy-holders annually, and then of dividing this sum equitably among the survivors. In the event of death during this period the full face of the policy is paid; in which case it has proved a productive investment to the extent of from 500 to 5,000 per cent of its cost. In the event of a policy-holder relinquishing his insurance, his reserve reverts to the surviving members."

In the indorsement on three of the policies, to which reference has been made, the credits to the reserve dividend fund are described as "gains from the following sources," and one of these sources is given as "The total reserve on all policies lapsing before the completion of said period."

I think that the tontine fund, under the plan thus stated by the defendant, was entitled to be credited either with the total amount of the legal reserve on all policies lapsing within the tontine period, or with such part of that amount as, in the fair judgment of the company, might properly be treated as surplus funds, not needed to strengthen its capital or otherwise to secure the performance of its obligations.

The "ordinary dividends allowed by the company," and paid or credited annually upon participating policies, came from such surplus as might remain, when, from the premiums accrued during the year upon all such policies, receipts of income from investments other than those representing the capital stock, and gains on sales of such investments,

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there was deducted the amount of its current expenditures, together with the requisite additions to the reserve to be carried for each policy, less subtractions for reserves no longer necessary because the policies, against which they were held, had ceased to be in force. There would be included in its current expenditures whatever it might pay on matured policies, or for the surrender value of policies purchased. The total amount of the reserves on lapsed policies was thus a source of credit to the general surplus, out of which the usual annual dividends to policy-holders were payable. But these dividends in the aggregate were not necessarily or probably to equal the amount of that surplus. It might at the reasonable discretion of the company be drawn upon for dividends to stockholders, or for a permanent addition to the company's investments to strengthen its financial credit. It might also be drawn upon to satisfy special contracts with special classes of policy-holders who had been induced to insure themselves in a particular way by the promise of such a benefit.

Such was the case of the tontine policy-holders under the reserve dividend plan. They had agreed, in lieu of receiving the usual dividends every year, to have the sum to which these would amount remain in the hands of the company for ten years, during which it would serve, in favor of its creditors, including themselves, as a "guaranty capital" in addition to the regular re-insurance reserve fund required by law, as was stated in Stewart's original Key to the Reserve Dividend Plan. In consideration of this the company promised them whatever gain might accrue from lapses of any of the policies in their tontine. One gain accrued by chalking off from the list of the company's liabilities the reserve previously held for each lapsed policy; for this left its amount a free asset, to be treated as such in computing the surplus available for dividends. But this cannot be what was intended by the separate specification of the total reserve on lapsed policies as an additional source of gain to those already described. The tontine policies were to have some benefit by these lapses besides that which was exhausted in

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increasing the usual dividends, in which all participating policy-holders shared alike. The only other gain they could have would be by a credit either of the total amount of these reserves to the tontine fund, or of such portion of it as the company thought it equitable to allow. There is nothing singular or unfair in such an arrangement.

The "Reserve Endowment Plan," which was combined with the "Reserve Dividend Plan" in all the policies in controversy, ensured to each surviving policy-holder who kept his policy in force during the whole term of his insurance (which might be longer than the tontine term), the full amount of the reserve which ought to have been held against his policy, whether in fact the company had maintained it inviolate, or not. The sum insured upon his life, being no longer payable in any contingency, he might fairly stipulate to have the reserve returned, which had been or ought to have been kept to meet the contingency of his previous death.

So all the members of the tontine might fairly stipulate with the company and each other, that if any of them let his policy lapse, the reserve which had been or ought to have been held against it, being freed by the lapse, should forthwith go into the tontine fund. While in the fund, it would be an asset of the company *quoad* its creditors. At the end of the tontine, it would be payable to the tontine survivors, subject only to such rights of creditors, and to any statute requirements as to the maintenance of an adequate re-insurance reserve.

The Superior Court has found that the policy contract was that dividends to members of the tontine should be made only out of the receipts for premiums upon the tontine policies, improved at interest; and that there must first be deducted, among other things, all sums paid for insurance upon the lives of those of the class who had died, and any amounts paid to buy in any of the class policies. I find no such provisions in any of the documents in proof. On the contrary, in the Key to the Reserve Dividend Plan, Stewart expressly says that "the expenses and death claims are paid out of the general fund of the company, and not charged to the class

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fund." Any other arrangement would violate the general principles of life insurance, which is only safe for either party when a large number of lives are at risk, so as to allow the doctrine of averages full play.

The Superior Court also denied the tontine fund any benefit from lapses, except that shared by all participating policyholders in the ascertainment of the surplus applicable to ordinary dividends. I think the policy, which, if obscure, should be construed against the defendant whose production it is, promised some addition to the fund, outside of its share in the usual dividends, from the reserves which were or ought to have been held against the lapsed policies; and that this proviso was valid and enforceable. In the preceding opinion of the court, it is said that if the undertaking were to account for the entire reserve, it would be a mere wager, and so void. To this I cannot agree. It seems to me a legitimate mode of reducing the cost of insurance to the survivors of the tontine, in the benefit of which all share alike at the inception of the contract, since the chances of life are then uncertain.

In my opinion, the total amount of the reserves belongs to the tontine fund, subject only to the rights of creditors or the provisions of statute law as to the necessary insurance reserve.

In Stewart's Key to the Reserve Dividend Plan, after explaining its right to the usual dividends, he says: "It is further stipulated that in case any member fails to keep his policy in force for the ten years he shall forfeit his reserve for the benefit of his class, which sum shall be kept at interest by the company, and divided in like manner." In his "Key to the Reserve Endowment Plan," he recurs to the subject of the "reserve dividend," and describes it thus: "The dividend is not a return at compound interest of the policyholder's own money, but the payment to him of his equitable share in the funds of the company. This share will include the contributions from lapsed dividends, reserves, and the dividends bequeathed by dying members." All this seems to me fundamentally inconsistent with the conclusions of the Superior Court, which were that the business of each

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tontine was to be marshaled by itself, but that lapses in tontine policies benefited the tontine only as it benefited every participating policy-holder.

Considerable weight is attached by the majority of the court to the provision in every policy that "an equitable surrender value will be allowed in purchase of this policy only at such times as a dividend may be due and payable upon it by its terms." As dividends while they might become "due" annually were not to be "payable" until the end of the tontine term, this forbade the company to buy in any of the tontined policies prior to that event. Its object, as it strikes me, was not to express a promise to pay a surrender value, but to provide against wronging the tontine survivors by denying them the full benefit of any lapse. Each policy provides distinctly that "in every case when this policy shall cease and determine or become or be null and void, all payments thereon shall be forfeited to the company," and that if there be any default in the payment of premiums, it "shall cease and determine." A purchase, therefore, of one who contemplated dropping his insurance, was an act of mere grace. If he belonged to a tontine, it was better for the other members that his relations to them should be terminated by a lapse rather than a purchase. A purchase would prevent a lapse, and by giving the company some rights as his assignee, or as respects the purchase money paid, would complicate or disarrange the final settlement of the tontine account. On the other hand, if a purchase were made at the end of the term, the company simply would become the assignee of the vendor's right in the accumulated fund, whatever it was.

I concur in the opinion that in the admission of expert testimony to determine the construction of written documents there was error, for which a new trial should be granted.

ANDREWS, C. J. I concur in the result, and in the opinion written by JUDGE HAMERSLEY, that there was error in the admission of the expert testimony. I dissent from that part of his opinion which discusses the meaning of the policies. On that part of the case I agree with the views expressed by JUDGE BALDWIN.

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FRANK T. LANE *vs.* THE BOARD OF HARBOR COMMISSIONERS FOR NEW HAVEN HARBOR.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The privilege or right of wharfing out over tide water flats to navigable water is, at least so far as the same has not been actually exercised, subservient to the public right of navigation.

This privilege of wharfing is given to the owner of the upland to enable him to reach deep water; and if, as in the present case, deep water is brought nearer to him by the excavation of a new inshore channel duly authorized by the Federal and State governments, before he has actually wharfed out, there is no reason why this new channel should not thereafter mark the limit of his wharfing privilege.

In 1892 the board of harbor commissioners for New Haven harbor granted a permit to the plaintiff to extend his wharf about 426 feet, whereupon he did build out about one half the authorized distance, and then stopped. In 1896 the secretary of war and a majority of said harbor commissioners, unknown to the plaintiff, gave other wharf owners permission to dredge a new channel at their own expense nearer the shore in front of their land and that of the plaintiff, and after that channel had been dug the board of harbor commissioners modified the wharfing permit issued to the plaintiff in 1892, and limited his right of extension to the line of the new channel. In an appeal from this action it was *held*:—

1. That the digging of the new channel did not constitute a taking of the plaintiff's land or property which required compensation under the Federal and State constitutions.
2. That the board of harbor commissioners, as agents of the State and in the interest of public navigation, had full power to modify the permit of 1892, and that the manner in which this power was exercised afforded the plaintiff no just ground of complaint.
3. That the plaintiff's right to cultivate oysters upon the soil excavated for the new channel, was held subject to the right of the State and of the United States to cut a channel there if the improvement of navigation required it.

[Argued April 26th—decided July 26th, 1898.]

APPLICATION for relief from an order of the commissioners for New Haven harbor, brought to the Superior Court in New Haven County and tried to the court, *Roraback, J.*;

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facts found and judgment rendered confirming said order, and appeal by the applicant for alleged errors in the rulings of the court. *No error.*

The application alleged, in substance, that Lane was the owner of land adjoining the waters of New Haven harbor, and of certain rights to extend wharves in front thereof; that he had in 1892 obtained from said harbor commissioners permission to extend wharves in front of said land nearly to the channel; that he had constructed said wharves in part and desired to complete them; that said board in September, 1896, without notice to him and without compensation made to him, had revoked and modified the permission to wharf out theretofore granted to him, and that he was aggrieved by said action.

The material facts found are these: Lane is the owner of land and of such rights to wharf out in front thereof as belong to littoral proprietors, and also has the right under the statutes of this State to plant and cultivate oysters in front of said land. In 1892 the harbor commissioners granted to him, on his application, the following permit: "Upon application No. 70, permit is hereby granted to Frank T. Lane to construct a pile and timber extension of wharves on his own premises on South Water street. The perpendicular distance from the south line of South Water street to the extreme outer end of said extension shall be not greater than to the outer end of Geo. H. Smith's wharf already constructed. *No portion of the work shall extend beyond the established harbor line.* This permit is granted upon the express condition that every person acting under the same shall conform to the representations of the application therefor, to the foregoing terms, and to all laws and ordinances applicable to the subject-matter thereof. It may be revoked at any time for a breach of its conditions."

At this time no harbor lines had been established in this part of New Haven harbor. The Smith wharf referred to in the permit extended from high-water mark about 426 feet. Under this permit Lane, in 1892, extended a wharf out for a part of this distance and there stopped. He did nothing

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more under it until after he had notice, in 1896, that it had been modified or revoked as hereinafter stated. The revocation or modification of which he complains was made under the following circumstances: The business done at the various wharves in the vicinity of this part of the harbor necessitates the use of a large number of steamers, schooners, sloops, scows, and other vessels. Up to 1896 public navigation had long "demanded a direct channel extending from these wharves at City Point to the main channel of the harbor, which is located about one mile east" of Lane's property. "Prior to this time those navigating the harbor were obliged to use a very crooked and narrow channel in passing to and from the different wharves, which channel frequently became impassable on account of ice in winter time, and was at no time passable except at certain stages of the tide. Even this crooked channel could not be reached from certain wharves east of said Lane, by vessels drawing over three or four feet of water, and then only at high tide."

In June, 1896, Smith Brothers, a firm who own and use a wharf here, acting for themselves and other adjacent wharf owners, obtained permission from the secretary of war to have the harbor at this place dredged according to a plan or drawing submitted to him. The application for such permission stated that the dredging was to be done for the purpose of "straightening the ship channel so that vessels belonging to the different parties interested can navigate the channel to better advantage." This permission was granted upon the following conditions: "1. That this permit shall not authorize any injury to private property, or invasion of private rights. 2. That the material dredged shall be disposed of in accordance with law. 3. That this permit shall expire August 31st, 1896. 4. That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality."

Afterwards, on the 18th of August, 1896, Smith Brothers applied to the board of harbor commissioners for New Haven harbor, "for a permit to dredge a channel 60 feet in width

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and about 600 feet in length, . . . being the same channel to dredge which permission has already been given by the United States government through the secretary of war on June 1st, 1896." This application was on the 20th of August, 1896, approved and the permit issued, but this was not done at a meeting of the board, nor by a vote of the board. Lane had no notice of the contemplated issue of this permit, and was not heard before said board nor before the commissioners, with reference to its issue, nor had he any opportunity to be so heard. The same is true of the issue of the permit by the United States government.

After these two permits had been issued, Smith Brothers employed a dredging company, which dredged out such new channel. In so doing the dredger destroyed and carried off a few oysters planted by Lane on his oyster ground, together with some of the material placed thereon to harden it.

The new channel is a great benefit to navigation, in no way interferes with Lane's wharf as at present constructed, and "improves his facilities for the enjoyment of the same."

After the new channel had been dug, the board of harbor commissioners, at a meeting held September 2d, 1896, passed the following votes: "Voted, that the permit granted to Smith Bros. Aug. 18th, 1896, by a majority of the harbor commissioners, to dredge a channel 60 feet in width and about 600 feet in length, the same having been approved by the secretary of war June 1st, 1896, is hereby approved by the unanimous vote of this board.

"Whereas, permission has heretofore been given to Frank T. Lane, of New Haven, to extend a wharf on his premises at Oyster Point, so-called, from high-water mark to the harbor line; and whereas said Lane has not up to the date hereof constructed his said wharf to said harbor line, but has constructed a wharf for a portion of the way only; and whereas a channel has recently been dug between said harbor line and the extreme southerly end of Lane's wharf as at present constructed, by permission of the United States government, a map of which channel is now on file in this office: Now therefore, be it voted: That the permit heretofore granted

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to said Lane, to extend his wharf to said harbor line, be and the same is hereby modified and altered so that the said Lane may and shall have permission to wharf out to the northerly line of said channel, but not beyond said line; and any authority or license he may have or claim to have to construct a wharf beyond said line, is hereby revoked."

Lane had no notice of this meeting, and did not attend, but immediately after the passage of these votes a copy of them was left with him. After this Lane drove spiles across the new channel and thereby obstructed its passage. These spiles are not connected with the main land, and serve no purpose save to obstruct navigation.

"The demands of navigation require that said Lane should not extend a wharf beyond the point named in the vote of the board of harbor commissioners on September 2d, 1896, and public convenience and the interests of navigation demand that the order of the board of harbor commissioners be affirmed."

In 1893 the legislature established harbor lines in this part of New Haven harbor, and the harbor line in front of Lane's land is substantially parallel with the shore there, and distant from it about 427 feet. The northerly or inshore line of the newly dredged channel, where it intersects the east boundary line of Lane's land extended southerly, is "about one hundred and eighty-two feet inside of the harbor line" at this point; and all the acts done by the dredging company in making said channel in front of Lane's land, were done within the harbor lines.

No compensation has been made to Lane for digging the channel, nor have any steps been taken to provide such compensation.

On the trial below Lane claimed: 1. That no application in writing was presented to or approved by the board of harbor commissioners, until after the digging of the so-called new channel. 2. The right of an adjoining property owner to wharf out over the tide-water flats, cannot be taken without compensation. 3. The right of an adjacent owner to wharf out over the flats is subject to this reservation, that he

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thereby does no injury to the free navigation of the water by the public. 4. A recital in the vote of September 2d, from which this appeal was taken, was not conclusive. This court had full authority to decide the question of fact whether such channel had been legally constructed, and whether Lane's wharf if extended would be an obstruction to navigation. 5. While the State of Connecticut in the exercise of the power of eminent domain could have authorized the taking of this land inside the harbor line for a public channel, the board of harbor commissioners had no such power. 6. The construction of this new channel and the limiting of the right to wharf beyond it, amounted to an establishment of a new harbor line for the said Lane. 7. This matter of authorizing the construction of a channel was a judicial not a ministerial question, as it called upon the board of harbor commissioners to pass upon the question of necessity. 8. That the board of harbor commissioners could not act singly, but could only act at a meeting. 9. That the vote of September 2d, was an attempted ratification by the board of an act already done, without the necessary written notice required by the Act of 1872, and without the necessary lawful authority and approval of the board of harbor commissioners; and that this was done when suit was already pending in relation thereto. Such action could not make legal an act originally unlawful. 10. If the new channel was illegally constructed, then the vote of September 2d was unjust. The board of harbor commissioners attempted to limit the said Lane's right to wharf out, without just cause. 11. That said order should be revoked.

The court overruled the claims set forth in all the foregoing sections, excepting those numbered 3 and 4.

The reasons of appeal are twenty-four in number, all of which, except the third and the last three, relate to the action of the court in overruling Lane's claims.

Roger S. Baldwin, with whom was *Henry Stoddard*, for the appellant (plaintiff).

The court erred in ruling that the right of the adjoining

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property owner to wharf out over the tide water flats, can be taken to construct a new channel, without compensation, and that the board of harbor commissioners had not the power to authorize the taking of these rights for such purpose. *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 283; *Chamberlain* v. *Hemingway*, 63 id. 8; *Prior* v. *Swartz*, 62 id. 137; *Ladies Seamen's Society* v. *Halstead*, 58 id. 150; 1 Sw. Dig. Chap. 12, p. 109. In determining the character of this franchise, caution must be exercised in construing the decisions of other States, because they are widely diverse, in many cases depending upon statute; whereas in our own State riparian rights spring from the common law of the colony, and long usage. Many States, controlled by the peculiar needs of their own commonwealth, have adopted a less liberal policy toward the shore owner, as in the case of the States of New York and New Jersey. *Shiveley* v. *Bowlby*, 152 U. S. 26. Whenever the riparian owner sees fit to exercise his franchise and wharf across, then the public are thereafter excluded from navigating over this territory and suffer no injury. The point of practical navigability beyond which a wharf will constitute an interference with navigation, is to be determined by considering the character of the commerce carried on in that locality. *Groton* v. *Hurlbut*, 22 Conn. 186; *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 445; *Parker* v. *West Coast Packing Co.*, 17 Or. 510; *Norfolk* v. *Cooke*, 27 Gratt. (Va.) 435. This was not merely the exercise of the police power: cutting this channel across these flats was a taking of the property. *Woodruff* v. *Catlin*, 54 Conn. 297; *Brown* v. *United States*, 81 Fed. Rep. 57. The only claim which would justify the digging of this channel across the plaintiff's land was that it was a public necessity. Here there was a judicial question to decide, and the board could only give the written approval prescribed by their charter by passing a vote at a meeting. *Martin* v. *Lemon*, 26 Conn. 194; *Board of Commissioners* v. *Vanderbilt*, 31 N. Y. 265; 2 Cook on Stockholders (3d ed.), § 713. This permit from the United States government is no justification for digging this channel. The national government has not the power

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to take the property rights of the plaintiff inside the established harbor line, without paying him for it. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 335, 345; *Brown* v. *United States*, 81 Fed. Rep. 57; *Alex. Ry. Co.* v. *Fanner*, 31 Gratt. (Va.) 765. The character of the proceedings under which this permit was granted, show that it was not intended to confer any rights in property. The construction of this new channel and the limiting of the right to wharf beyond it, amounted to an establishment of a new harbor line for Lane. This the board could not do in the manner attempted by it. *Miller* v. *Mendenhall*, 43 Minn. 101; *Bay City Gas Co.* v. *Industrial Works*, 28 Mich. 184; *Thunder, etc., Co.* v. *Speechly*, 31 id. 344.

William H. Ely, for the appellee (defendant).

In this jurisdiction the title to the soil below high-water mark is in the State, and the rights of wharfage which the upland proprietor may have are subject to the rights of navigation. *East Haven v. Hemingway*, 7 Conn. 202; *Church* v. *Meeker*, 34 id. 430; *Mather* v. *Chapman*, 40 id. 382. The entire right of the upland proprietor is clearly stated by JUDGE PARDEE in *State* v. *Sargent*, 45 Conn. 372–374. The case of *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 278, does not in any way conflict with the doctrine laid down in *State* v. *Sargent*. It must be manifest, therefore, that the right to wharf out belonging to Mr. Lane, or any other upland proprietor, is a qualified and not an absolute right, and this right of Mr. Lane's has not been interfered with or taken away. Whatever right he had was subject to the right of navigation. This right he has now, but navigation, the court finds, demanded and still demands that he shall not extend his wharf beyond a certain point, and the paramount rights of navigation have been protected by the order of the court. *Stevens* v. *Railroad Co.*, 34 N. J. L. 532. The plaintiff's right to cultivate oysters is also subordinate to the rights of navigation. *Prior* v. *Swartz*, 62 Conn. 132. The acts of the majority of the commissioners, and of the board itself, gave all necessary authority to dig the channel; and whether it

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did or not is immaterial, for if the demands of navigation required that Mr. Lane should not extend a wharf beyond the point fixed by the board on September 2d,—and the court finds that it did—the board had a right to pass, and it was their duty to pass, the order appealed from by Mr. Lane. The permit to Mr. Lane was a mere license. *Stevens v. R. Co., supra; Newark Bd.* v. *Passaic*, 45 N. J. Eq. 397; *Classen* v. *Chesapeake Co.*, 81 Md. 258; *Girard* v. *Hughes*, 1 Gill & J. (Md.) 249–265; *Shively* v. *Bowlby*, 152 U. S. 56. Being a license, and not acted upon, it stands as every other license, and could be limited or revoked at any time without notice or an opportunity to be heard. *St. Louis* v. *Western Union Tel. Co.*, 149 U. S. 470; *R. Co.* v. *Baltimore*, 26 Atl. Rep. 510; *Commonwealth* v. *Kinsly*, 133 Mass. 578; *Calder* v. *Kirby*, 5 Gray, 597; *Hibbard* v. *Chicago*, 59 Ill. App. 470; *Eddy* v. *Granger*, 31. Atl. Rep. 831; *Shively* v. *Bowlby*, *supra*. The question of his right to be heard is no longer a question of importance. Gen. Stats. § 3245. In the Superior Court a full hearing was granted him and all his claims were presented before a tribunal which took the place of the harbor commissioners and had the power to confirm, annul or modify any action of said board. The appellant has had his day in court, and the Superior Court has found that navigation demanded the action of the board of harbor commissioners. "The right of appeal being afforded, the plaintiff could not be harmed by any finding the Commissioners should make." *N. Y. & N. E. R. Co.'s Appeal*, 62 Conn. 527–541; *Bletcher* v. *Ferrar*, 8 Allen, 326. The whole question involved in this case seems to have been discussed and settled by the Supreme Court of New Jersey, where the upland proprietor has the same rights that he possesses in Connecticut. *Stevens* v. *Paterson, etc., R. Co.*, 34 N. J. L. 545–550.

TORRANCE, J. In 1892 the harbor commissioners gave Mr. Lane a written permit to wharf out over the tide-water flats in front of his upland, for a distance of about 426 feet towards the then only existing channel there. In September, 1896, they by a vote, under the circumstances stated in

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the record, revoked that permit in part, and, in effect, limited his right to wharf out, to the new channel made in August, 1896, which was about 200 feet inside of his permit of 1892. In his application to the Superior Court the only thing of which Mr. Lane complains is the passage of this vote. The main question before the trial court, and upon this appeal, is as to the validity of that vote. If, under the circumstances stated in the record, the board had the power to pass this vote, then we think the power was legally and properly exercised, and the judgment of the court below was right.

The determination of this question involves a brief consideration of the rights and powers of the State over these tide-water flats, of the rights of the upland proprietor to wharf out over them, and of the powers conferred upon the harbor commissioners with respect to them.

In our own State it is elementary law: (1) that, subject to the limitations of the Federal Constitution, the State has the *jus publicum*, or right of governing its shores and navigable waters for the protection of public rights, and also the *jus privatum*, or title to the soil itself below high-water mark, in trust for the public use and benefit; (2) that the littoral proprietor owns in fee only to high-water mark, but that he has, in the shore in front of his upland, certain exclusive advantages called in our reports rights, privileges, and franchises, among which is the right of access to actually navigable water by wharfing out; (3) that the right or privilege of wharfing out, certainly so far at least as it has not been actually exercised, is held subordinate and subservient to the public right of navigation.

These statements of the law are supported by the *dicta* and decisions of this court in all the cases upon this subject, from that of *East Haven* v. *Hemingway*, in the 7th Conn., down to that of *Prior* v. *Swartz*, in the 62d Conn.

Over the tide-waters in question, then, the right of public navigation is a dominant right in relation to the unexercised right of wharfing out; and whenever such right to wharf out conflicts with the exercise of this dominant right, the right to wharf out must give way. For the purposes of this

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case it is, perhaps, sufficiently accurate to say that the duty of protecting this dominant right rests upon the State and the United States, and consequently the right and power to protect it is in them. *State* v. *Sargent & Co.*, 45 Conn. 358; *Gibson* v. *United States*, 166 U. S. 269.

This power to protect the dominant right, includes not only the power to keep the navigable waters free from encroachments and obstructions, but also the power to improve the navigability of those waters by deepening, straightening or widening old channels, or digging new channels, or otherwise, anywhere below high-water mark, certainly as against the unexercised right to wharf out. *Hollister* v. *Union Co.*, 9 Conn. 436; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, *supra*; *Holyoke Water Power Co.* v. *Conn. River Co.* (U. S. Cir. Court), 52 Conn. 570.

This power of the State to protect and improve the navigability of the waters of New Haven harbor, is now vested largely in the board of harbor commissioners for that harbor. *State* v. *Sargent & Co.*, *supra*. By the second section of the Act establishing said board, there is given to it "the general care and supervision of New Haven harbor and its tide-waters, and of all the flats and lands flowed thereby, in order to prevent and remove unauthorized encroachments and causes of every kind which are liable to interfere with the full navigation of said harbor, or in any way injure its channels, or cause any reduction of its tide-waters." By the fourth section it is provided, in substance, that no person shall build over the harbor or tide-waters any bridge, wharf, pier, or dam, or fill any flats, or drive any piles below high-water mark, without a permit from the board, and that all such work shall be done under the supervision of the board. By the sixth section "any erection or work" made within the tide-waters of the harbor without the sanction of the commissioners, where such sanction is required, is declared to be a public nuisance, and the commissioners are empowered to bring suits in the name of the State to prevent such nuisance. Section seven empowers the commissioners to apply to congress "for appropriations for protecting and improv-

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ing said harbor." Section eight provides that the expenses incurred by the commissioners shall be paid by the city of New Haven, and further, that "no contracts shall be made, and no acts done by said commissioners, which involve the payment of any money from the treasury of said city, except as herein provided, without an appropriation expressly made for that purpose by the court of common council of said city." 7 Special Laws, p. 287.

Under this Act we think the State has delegated to the harbor commissioners, as its agent, such power as the State itself possesses, not only to protect, but to improve, the navigability of these waters; but the exercise of the power to improve seems to be limited to cases in which valid appropriations have previously been made to the board for improvements, and to cases where private individuals or corporations are willing to make the improvements at their own expense. In numerous instances, as may be seen in the volumes containing our special laws, the State has permitted private individuals and corporations to improve the navigability of its waters at their own expense, and under the Act aforesaid we think the board has the same power. This power would be subject, of course, to the limitations imposed on it by the Constitution and laws of the United States. Subject to those limitations, we think the board had full power to authorize the digging of the new channel, and full power, under the circumstances detailed in the record, to pass the vote of which the appellant complains.

Lane had obtained a permit to wharf out in front of his land for a distance of about four hundred and twenty-six feet. Under that permit he wharfed out forty or fifty feet, and there stopped. This was the condition of his wharf when the new channel was dug in 1896. The northerly or inshore line of the new channel in front of Lane's land, was in the neighborhood of two hundred feet inside of the harbor line and of his permit line, and about two hundred feet outside of his wharf. A portion of the old channel in front of the wharves in this part of the harbor, was shallow, narrow and very crooked, and the demands of public navigation

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required that it should be straightened, deepened and widened. The new channel, six hundred feet long and sixty feet wide, running in part over the flats in front of Lane's upland, was made to avoid this narrow, shallow and crooked portion of the old channel, and was in effect simply a straightening and improvement of it for the benefit of navigation. It is found that the new channel greatly improves the navigability of these waters, and that "the demands of public navigation require that it be kept open and unobstructed."

Under the Act of Congress approved July 13th, 1892, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," a part of which is in substance recited in the permit issued by the secretary of war, we think the secretary had power to authorize private individuals to dig this new channel for the benefit of navigation at their own expense.

This new channel was thus made with the sanction and approval of the State and of the United States, through their duly authorized agents, respectively. It was to be made under the supervision of the engineer officer of the United States in charge of this locality, and of the board of harbor commissioners; and for aught that appears of record it was so done. The work was thus done under the authority and supervision of the State and of the United States, and for the purposes of this case must be regarded as having been done by them. The work was done, so far as the present case is concerned, by the private individuals who executed it, in good faith and strictly according to the plan approved by the secretary of war and the board of harbor commissioners.

This new channel, then, was rightfully made across these flats, unless the mere digging of it constituted an invasion of the appellant's rights of property. If it was rightfully dug, we think the board had full power to modify the permit of 1892, and was fully justified in modifying it in the manner set forth in the record. The privilege of wharfing

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out is given to the owner of the upland to enable him in that way to reach deep water. When by his wharf he reaches deep water, there is no reason why he should wharf out further; and if, as in this case, before he has wharfed out, deep water is brought nearer to him than it was before, there is no reason why that deep water should not be the limit of his privilege.

The appellant claims that the digging of the new channel constituted a taking of his property, an invasion of his rights, and that neither the State nor the United States could do this, nor authorize it to be done, without condemning that property and making compensation therefor. It is upon this fundamental claim that most of the other claims of the appellant are based. This claim is without foundation. It arises we think from a misapprehension of the exact nature of the unexercised right to wharf out, and of its relations to the dominant right which was exercised in digging the new channel.

So far as the appellant's right to cultivate oysters upon these flats is concerned, he clearly held it subject to the right of any wharf or pier owner to cut a channel through the designated ground in front of such wharf or pier in order to reach deep water; *Prior* v. *Swartz*, 62 Conn. 132; and if this be so, he certainly held that right subject to the right of the State and of the United States to cut a channel here if the improvement of navigation required it. The unexercised right to wharf out he also held subject and subordinate to the dominant right in the United States or the State, or both, to improve the navigability of the waters here. The mere existence of a right to wharf out does not preclude the exercise of the dominant right; and if, in the legitimate exercise of that dominant right, the advantages and privileges of the upland proprietor in or over the flats are diminished or even destroyed, it is *damnum absque injuria*. He held his rights subject to just such a contingency. *Gibson* v. *United States*, *supra*. In this view of the case, no property of the appellant was taken and no rights of his were invaded, by the mere digging of the new channel. It follows from this

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that he was not, as claimed by him, entitled to notice and hearing before the secretary of war and the commissioners, before the permits to dig the new channel were issued; and that so far as he is concerned, and in this proceeding, they were properly issued and fully empowered Smith Brothers to dig the new channel.

Upon the facts found we are of opinion that the vote complained of was a valid vote, and that the court did not err in confirming it.

There is no error.

In this opinion the other judges concurred, except BALDWIN, J.

BALDWIN, J. (concurring in the judgment, but dissenting in part from the opinion). I concur in the opinion of the court that the privilege of wharfing out is given to a littoral proprietor to facilitate his access to deep water, and that when deep water was brought by the newly dug channel nearer to the appellant's upland than it was when his as yet unexercised license to fill upon the flats was originally granted by the board of harbor commissioners, that board had a right to revoke its grant without notice to him, so far as to limit his wharfage rights to the line of that channel; that this limitation took from him no property or vested right; and therefore that no provision for compensation was required.

I do not think it necessary to determine whether the channel was rightfully dug. It seems to me enough that it was dug under color of right. Had it been the work of a waterspout, or a ship driven by a hurricane, the situation would have been the same. The fact of the existence of such a channel made it inexpedient that its navigation should be barred by constructing a wharf across it.

I therefore concur in the judgment; but I do not concur in so much of the opinion as upholds the validity of the permits or licenses from the board of harbor commissioners and the acting secretary of war of the United States, under which

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the new channel was dug across the flats. As to that, grave constitutional questions are involved, which it seems to me unnecessary to decide in order to dispose of the case in hand.

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ALEXANDER WILDMAN *vs.* SUSAN E. WILDMAN.

Third Judicial District, Bridgeport, April Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

A cause of action consists of a right belonging to the plaintiff, and some wrongful act or omission by the defendant by which that right has been violated.

The plaintiff sought to have certain deeds executed and delivered by him to the defendant, canceled and adjudged void. The defendant was his sister. He alleged in his complaint that the deeds were absolutely without consideration and had been given to prevent his wife from obtaining dower in the event of his death, but that such purpose had been abandoned by the parties shortly after the delivery of the deeds; that the defendant had for years thereafter treated the property as still the plaintiff's, and had never asserted the slightest ownership to the land therein conveyed until recently, when she became incensed against him and caused the deeds to be recorded and mortgaged the property for $5,000 for her own benefit. In a prior action between the same parties litigating in the same right, the plaintiff alleged that the defendant was in possession of the same deeds, which she had caused to be recorded, but that he, the plaintiff, had never executed or delivered said deeds to the defendant; and prayed that they might be canceled and set aside. The defendant admitted the possession and recording of the deeds, but denied the averments respecting their nonexecution and delivery by the plaintiff. Upon this issue judgment was rendered for the defendant, and this judgment was pleaded by the defendant in bar of the present action. *Held:*—

1. That the invalidity of the deeds at the time they were recorded, and not the ground of such invalidity, constituted the essential element of the plaintiff's cause of action.
2. That inasmuch as such invalidity was alleged in each complaint and formed the wrong or injury complained of, the causes of action set forth in the two suits were identical, and the judgment in the earlier suit operated as a bar to the maintenance of the present action.

It is within the discretion of the trial court to refuse an amendment of the complaint enlarging the issue, if offered at a late stage of the trial.

[Argued April 27th—decided July 26th, 1898.]

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SUIT for an injunction and for the delivery and cancellation of certain deeds, brought to the Superior Court in Fairfield County and tried to the court, *Shumway, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The plaintiff and defendant are brother and sister. In April, 1895, the plaintiff brought a suit against the defendant, and in his complaint in that action alleged that she had two written instruments in her possession which purported to be quitclaim deeds of certain real property in Danbury belonging to him, and had caused these deeds to be recorded in the Danbury land records; that he had never executed or delivered said deeds, or either of them, to the defendant; and prayed that these instruments might be delivered up in court, canceled and set aside. The defendant admitted the possession of the instruments and that she had caused them to be recorded, but denied the plaintiff's averments of non-execution and nondelivery. Upon this issue judgment was rendered for the defendant.

The finding of facts in that action, which was made part of the judgment file, was closely followed by the plaintiff in the present action in framing his complaint, the allegations of which were, briefly, these: That the plaintiff was and for many years had been the owner and possessor of certain real estate in Danbury, worth $50,000; that in 1883 he believed his wife had been guilty of adultery and was contemplating divorce proceedings against her; that about that time it was arranged between himself and the defendant, who was his sister, that deeds of his real estate should be executed and delivered to her, in order to prevent his wife from obtaining dower therein, in the event of his death; that the deeds were made and delivered as arranged and were absolutely without any consideration; that his wife obtained a divorce from him in 1887 upon the ground of desertion, and alimony to the amount of $10,500, which sum he raised by mortgage on the aforesaid real estate, and that the defendant knew of and acquiesced in this; that he and his sister abandoned the

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purpose for which said deeds were given, shortly after their delivery, and thereafter said deeds were considered by them as of no effect whatever and, as between themselves, were canceled; that she had abandoned all right and interest in and to the property, but afterwards became angry with the plaintiff and on December 5th, 1894, caused the deeds to be recorded, and had since mortgaged the property for $5,000, and claimed the right to collect the rents from the tenants, etc. The relief prayed for was a cancellation of said deeds and, meanwhile, an injunction to restrain the defendant from interfering with the collection of rent, etc. This action was commenced in December, 1895.

As her third defense the defendant pleaded the former adjudication in bar of the present suit, alleging that the causes of action were identical. This defense was sustained and the plaintiff appealed. Other facts material to the cause are stated in the opinion.

Robert E. De Forest and *Henry A. Purdy*, with whom was *James E. Walsh*, for the appellant (plaintiff).

A judgment as a bar to the prosecution of a second action, is to be distinguished from a judgment as evidence to prove some fact in dispute. *Fuller* v. *Ins. Co.*, 68 Conn. 55, *Betts* v. *Starr*, 5 id. 550. There was no claim made in the former case that the plaintiff was entitled to recover, although he executed and delivered the deeds; and even if it was made the court could not consider it. *Moran* v. *Bentley*, 69 Conn. 392. *Res judicata* is to be distinguished from the doctrine of election. There are cases which hold that where a party has two remedies and pursues only one, he is estopped from pursuing the other, even though he is unsuccessful in the first suit. The defendant sought to invoke this ground of defense in this action; but upon demurrer it was held insufficient. *Thomas* v. *Joslin*, 36 Minn. 1; *Steinbeck* v. *Ins. Co.*, 77 N. Y. 498; *Washburn* v. *Ins. Co.*, 114 Mass. 175; *Bell* v. *McCulloch*, 31 Ohio St. 397; *State* v. *B. D. & Co.*, 45 Mo. 99. It will be seen that the question of "the same cause of action," has nothing to do with this doctrine of election. To constitute

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a bar, the former suit must have been for the same cause of action. There are authorities holding that a former judgment is a bar to any subsequent action upon any claim or demand which might have been litigated in the first, although it was not in fact so litigated. But all such cases are based upon the ground that the claim or demand sued upon in the second action was a part of the same claim or demand sued upon in the first action; in other words "the same cause of action." 2 Black on Judg. § 725; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Lyon* v. *Perin, etc., Co.*, 125 id. 698. A former judgment is a bar, when the same issue was raised by the pleadings and was decided by the judgment. *Moran* v. *Bentley*, *supra*. A former judgment may be a bar when the same issue was raised under the pleadings, but was not litigated nor decided. The above rule applies only to entire claims and demands. *Hungerford's Appeal*, 41 Conn. 322; *Anderson* v. *Gregory*, 43 id. 61; *Maltby's Appeal*, 47 id. 349; *Carver* v. *Staples*, 52 id. 21; *Darmon* v. *Denny*, 54 id. 253; *Craft Refrigerating Co.* v. *Quinnipiac Brew. Co.*, 63 id. 563. But the defendant claims that the issue now sought to be raised by the pleadings might have been raised and decided in the former suit. This claim is unsound. *Crandall* v. *Gallup*, 12 Conn. 326; *Dickinson* v. *Hayes*, 31 id. 417; *Hollister* v. *Lefevre*, 35 id. 456; *Percy* v. *Foote*, 36 id. 102; *Sheldon* v. *Bradley*, 37 id. 324; *Anderson* v. *Gregory*, *supra*; *Supples* v. *Cannon*, 44 id. 434; *Kashman* v. *Parsons*, 70 id. 39. The rule that a judgment is a bar to litigating in another suit matters which might have been litigated in the former suit, is strictly confined to cases where the first suit was upon the same claim or demand that the second suit is brought to enforce, that is, where the claim or demand declared upon in both suits constitutes a single claim or demand, and one and the same cause of action. *Marlborough* v. *Sisson*, 31 Conn. 332; *Burritt* v. *Belfy*, 47 id. 323; *Maltby's Appeal*, *supra*; *Jones* v. *Toler*, 4 Mass. 255; *Patterson* v. *Jenner*, 27 Ind. 457; *Watts* v. *Watts*, 160 Mass. 464; 1 Freeman on Judg. §§ 238, 240, 249, 259; 2 Black on Judg. §§ 726, 734; *Taylor* v. *Castle*, 42 Cal. 371.

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The facts which were alleged as establishing the right in the former suit, were the nonexecution and nondelivery—the nonexistence of the deeds. The facts establishing our right in the suit at bar, are the execution and delivery of the deeds, and their fraudulent use by the defendant. The two are no more identical than daylight and darkness. Each one excludes the other. By no possibility could both form parts of any one cause of action. While both might be included in one action in different counts, yet no rule of law compels the plaintiff to so combine them, or prevents him from bringing separate suits upon each.

Lewis E. Stanton, and *Lyman D. Brewster*, with whom was *Samuel A. Davis*, for the appellee (defendant).

The judgment in the former suit, brought for the cancellation of certain deeds, is conclusive of the present suit brought for the cancellation of the same deeds. "In a suit to cancel a deed, the plaintiff must bring forward all his grounds, as a decree denying relief will bar a new suit for any cause." 1 Van Fleet on Former Adjudication, § 70; *State* v. *Barr Dry Goods Co.*, 45 Mo. App. 96–99; *Foster* v. *Hinson*, 76 Iowa, 714; *Bell* v. *McCullough*, 31 Ohio St. 397; *Watkins* v. *Lawton*, 69 Ga. 671–674; *Brown* v. *State*, 64 Md. 199; *Aurora City* v. *West*, 7 Wall. 102; *Beloit* v. *Morgan*, 7 id. 622; *Griffin* v. *Hodshire*, 119 Ind. 235–243; *Hamilton* v. *Quimby*, 46 Ill. 90–94; *Washburn* v. *Ins. Co.*, 114 Mass. 175; *Hackworth* v. *Zollers*, 30 Iowa, 433; *Lamb* v. *McConkey*, 76 id. 47; *Rogers* v. *Higgins*, 57 Ill. 244; *Hawes* v. *Joslyn*, 36 Minn. 1. This doctrine is in accord with the doctrine of *res judicata* established by our court, from *Comes* v. *Prior*, Kirby, 376, to *Vincent* v. *McNamara*, 70 Conn. 332. It is perfectly consistent with the law laid down in *Betts* v. *Starr*, 5 Conn. 550, *Sargent* v. *New Haven Steamboat Co.*, 65 id. 116, and *Huntley* v. *Holt*, 59 id. 102–108. But whatever might have been decided in a given cause is as much *res judicata*, as if directly alleged and directly decided, provided always the question in controversy is the same. 1 Herman on Estoppel, §§ 122, 123; *State* v. *Brown*, 64 Md. 199; *Hall*

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v. *Forman*, 82 Ky. 505; *Laffoon* v. *Fretwell*, 24 Mo. App. 258; *Bennitt* v. *Star Mining Co.*, 119 Ill. 9; *Spaulding* v. *Warner*, 59 Vt. 646; *Long* v. *Trexler*, 8 Atl. Rep. (Pa.) 620; *Hadges* v. *Bullock*, 10 id. (R. I.) 643; *Young* v. *Brehi*, 12 Pac. Rep. (Nev.) 564; *Wilson* v. *Deen*, 121 U. S. 525; *Carr* v. *Hanckel*, 5 S. E. Rep. (S. Car.) 818; *Corprew* v. *Corprew*, 5 S. E. Rep. (Va.) 798; *Fuller* v. *Ins. Co.*, 68 Conn. 64; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683–687; *So. Pac. R. R.* v. *U. S.*, 168 U. S. 1–40; *Roby* v. *Calumet, etc., Dock Co.*, 165 Ill. 277. Whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action, or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. *Burritt* v. *Belfy*, 47 Conn. 323. The plaintiff's offer to amend at the end of the first trial does not aid him. In the first place there was no amendment presented, nothing for the court to act on, or on the rejection of which error can be predicated. And, in the second place, such amendment, if it had set up all the facts and conclusions found by *Judge Wheeler*, would not have entitled the plaintiff to a judgment in his favor; for the conclusions of the judge in the original finding, that the acts of the parties after the passing of the deeds and abandonment of the original design revested the title in the plaintiff and canceled the deeds as between the parties, are erroneous. *Coe* v. *Turner*, 5 Conn. 93. The court below having found the third defense good, and that the whole subject of controversy had been fully determined in the former suit, was justified in declining to pass on any other issues in the case. Strictly, there were none left to pass on. All further inquiry and decision became immaterial. *Brand* v. *James*, 67 Wis. 54. The complaint is insufficient and cannot be made sufficient. There is an overwhelming current of authority that a conveyance made in order to defeat dower is fraudulent and void. *Simar* v. *Canaday*, 53 N. Y. 298–304; *Brown* v *Bronson*, 35 Mich. 415; *Gilson* v. *Hutchinson*, 120 Mass. 27,

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1 Woerner on Admr. 247; *Thayer* v. *Thayer*, 14 Vt. 118; *Jiggitts* v. *Jiggitts*, 40 Miss. 718–722; *Littleton* v. *Littleton*, 1 Dev. & B. L. 327; *McGee* v. *McGee*, 4 Ired. 105–107. The case of *Stewart* v. *Stewart*, 5 Conn. 316, decided in 1824, can easily be distinguished from the present cause, and furthermore its authority has been shaken or overthrown. A party who has made a fraudulent deed cannot have the aid of a court of equity to set the same aside. *Barnes* v. *Starr*, 64 Conn. 136.

ANDREWS, C. J. Of the very numerous assignments of error presented by this appeal, those arising upon that part of the record which pertains to the third defense are controlling of the whole case. The trial court in finding the issue made by the denial of that defense, in favor of the defendant, decided as a matter of fact that the same cause of action as is set forth in this complaint had been adjudicated and decided between the same parties in the former actions mentioned in said defense. And in sustaining the defendant's demurrer to the plaintiff's replication to that defense, the court decided the same question in the same way, as a matter of law. If the latter decision is without error, then there is no harmful error anywhere in the entire record.

"It is an established rule in the administration of justice, that all controversies between parties, once litigated and fully and impartially determined, shall cease; and to that end no fact involved in such litigated controversy, shown by the record to have been material to its determination, and to have been put in issue and decided, whether the proceeding was at law or in equity, shall again be litigated between the same parties." *Munson* v. *Munson*, 30 Conn. 425, 433. "The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor on the presumption that the former judgment was right and just; but on the broad ground of public policy, that requires a limit to litigation, a curb on the litigiousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest. As expressed by JUDGE PARDEE in *Supples* v. *Cannon*, 44 Conn.

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424, 428: 'The policy of the law is, that if a claim has once been passed upon by a court of competent jurisdiction, it shall not be thereafter controverted between the same parties, and this in the interest of peace.'" *Sargent & Co.* v. *New Haven Steamboat Co.*, HAMERSLEY, J., 65 Conn. 116, 126. "The judgment of a court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." *Duchess of Kingston's Case*, 2 Smith's Leading Cases, *573.

The binding force of the rule stated in these authorities is not in any degree disputed by the appellant. He admits it. But he contends that this case does not come within it. It is difficult, however, to reconcile the plaintiff's claim in this behalf, made in this court, with his claims made in the court below. We learn from the finding of facts that "the plaintiff offered in evidence the entire record, pleadings, finding of facts and files of the judgment in two previous trials between the same parties, claiming the same as conclusive upon the parties in regard to the facts in this suit, and offered the same to prove the allegations of the complaint;" and that he "offered no other evidence than said record, pleadings, findings and judgments, in proof of the allegations of his complaint, and thereupon rested his case." Claiming, as he did, that the record in the former case was conclusive upon the parties in this case, he thereby claimed—for otherwise the record would not have had that effect—that the same point was directly in issue in this case which was directly passed upon in the former case. *Duchess of Kingston's Case, supra.* The application for an injunction against using the deeds was a part of that suit and nothing else.

Every action is brought in order to obtain some particular result which is termed the remedy. This final result is not the "cause of the action;" it is rather the "object of the action." Every judicial action has in it certain necessary elements,—a primary right belonging to the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in

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a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing out of this delict; and finally the remedy, or relief itself. Every action, however simple, must contain these essential elements; and however complicated it has no more. Of these elements, the primary right and duty and the delict or wrong, constitute the cause of action. They are the legal cause or foundation whence the cause of action springs. Pomeroy's Remedies, § 453. Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff and some wrongful act or omission done by the defendant, by which that right has been violated. *Veeder* v. *Baker*, 83 N. Y. 156, 160; Yale Law Journal, March, 1898, page 246, *Prentice, J.;* Phillips on Code Pleading, § 31.

An inspection of the record in this action, and a comparison of its averments with the record in the former one, shows that this action is between the same parties as was the former one, and that in each action the parties are litigating in the same right: the plaintiff as the owner of certain lands,—the same in the former action as in this one,—and the defendant in her individual right; that the deeds which it is sought to set aside in this action are the very same deeds which it was sought to set aside in the former one; that the sole delict or wrongful act of which the plaintiff complained in the former suits, and the main delict of which he now complains, *i. e.* the putting of the said deeds on record, is the same in this action as in the former one; and that the main part of the relief claimed, *i. e.* that the said deeds be delivered up to be canceled, is the same in this action as in that.

In each of the actions we are comparing, the plaintiff declares as the owner of certain land. The primary right of ownership of land includes in it certain special rights: as the right to use the land in any manner permitted by law, and to have the unmolested occupation of it, as well as to have an unmolested title to it. And these primary rights belonging to the plaintiff, impose the correlative primary duty on the part of all mankind to forbear from molesting him in such use, occupation, or title.

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In each of these actions the defendant is charged with putting certain deeds on the town record in the town where the land lies; and it is in each case the same deeds and the same act of putting them upon the record, that is charged. It is this act of putting these deeds upon the record which is complained of in each action as violating the plaintiff's primary right to have an unmolested title to his lands. In both actions it is the same primary right belonging to the plaintiff, which is averred, and one and the same act done by the defendant by which that primary right is said to be violated. Going back to the definition of a cause of action, given a little above, we are not able to see why "the legal cause, or foundation whence the cause of action springs," is not the same in the former action as in this one.

It is true that the relief claimed is not a part of the cause of the action. But the relief claimed may serve to determine what the cause of action is. The cause of action is the existence of that state of facts, or the existence of *a* state of facts, which entitles the plaintiff to the relief claimed. The plaintiff sued as the owner of certain lands. Such ownership clothed him with the primary right to have an unclouded title to those lands. The relief claimed was, that deeds of those lands which the defendant had put on the town record be delivered up to be canceled. He would not be entitled to that relief unless he had such a title to the lands described in them, that the act of the defendant, in putting those deeds on the town record, violated his primary right to have such an unclouded title thereto. And this he must, of course, set out in the complaint. It is a part of his case; without it he would have no right to the remedy, and the complaint would show no cause of action. If the deeds which the defendant had recorded were valid, at the time they were so put upon the records, then the plaintiff did not have such a title. It was essential, therefore, that in the complaint these deeds be averred to be invalid at the time of such putting them upon the records; because that is the time at which, if ever, the act of the defendant in recording them did injury to the plaintiff; and otherwise the complaint would not show a suffi-

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cient cause of action. In his complaint in the former action the plaintiff negatived the validity of these deeds, by alleging that they had never been executed or delivered by him. If this allegation was true, then the plaintiff was entitled to the relief claimed, for the reason that the deeds were invalid when recorded. In his complaint in the present action he negatives the validity of the deeds by alleging that they had, as between the parties, before they were recorded, been canceled. If this allegation was true, then the plaintiff was entitled to the relief claimed, for the same reason: that is, that the deeds were invalid at the time of the recording. It is the invalidity of the deeds at that time,—from whatever cause arising,—that is the essential element of the plaintiff's cause of action. The causes which produces the invalidity is only an evidential circumstance; it is not an element, certainly not an essential element, in the cause of action. The invalidity of the deeds at the time of the recording, being the same in each complaint, it is the same cause of action in both.

The cause of an action is the existence of *a* state of facts which entitles the plaintiff to the relief claimed. Any state of facts which entitles the plaintiff to that relief shows a cause of action. Such a state of facts may be, and usually is, made up of several ingredients. It is easy to perceive that there might be more than one statement of facts containing some one or more different ingredients, each showing the same right to recover with the facts of each existing at the same time. And although the ingredients in such statements might differ, if each showed that the plaintiff was the owner of the same right, that the defendant had committed the same violation of that right, and that the plaintiff was entitled to the same relief, they would each show the same cause of action and not a different one. Such we think is this case.

"If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action. . . In applying this test, however, it must be ob-

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served that the single primary right, and the single wrong, which, taken together, constitute the one cause of action, may each be very complicated. For example, the primary right of ownership includes not only the particular subordinate rights to use the thing owned in any manner permitted by the law, but also similar rights to the forbearance on the part of all mankind to molest the proprietor in such use. The facts which constitute the delict complained of may embrace not only the wrongful obtaining, and keeping possession, in such a case as the one last supposed, but also the procuring and holding deeds of conveyance, or other muniments of title, by which such possession is made possible, and to appear rightful. These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of." Pomeroy's Remedies, § 455.

The inspection of the record also discloses that the different causes by which the invalidity of the deeds is shown, were both known to the plaintiff before he brought the former suit, and that by proper care both might have been shown on the former trial. A single cause of action cannot be split in two. If the plaintiff's complaint in the former action was so framed that he could not avail himself of all the evidence which he had to prove his right to recover, and so suffered defeat, it may be his misfortune. By that judgment the plaintiff is bound. He sought an amendment to enlarge the issue, but at so late a stage of the trial that the judge for that reason disallowed the motion. His cause of action has been adjudicated. He cannot now have another trial to enable him to use such other evidence to obtain the same remedy. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Burritt* v. *Belfy*, 47 Conn. 323. "The policy of the law is, that if a claim has once been passed upon by a court of competent jurisdiction, it shall not thereafter be controverted between the same parties, and this in the interest of peace."

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There must be a "limit to litigation, a curb on the litigiousness of the obstinate litigant." *Sargent & Co.* v. *New Haven Steamboat Co.*, *supra*, HAMERSLEY, J.

There is no error.

In this opinion the other judges concurred except HAMERSLEY, J., who dissented.

HAMERSLEY, J. (dissenting). The only issue raised by the pleadings and tried by the court in the first case, was, did the plaintiff execute and deliver the deeds? He asked to have them delivered up in court for cancellation, solely on the ground that they were not his deeds. Upon this issue evidence was received tending to support, and, as the court found, proving, a state of facts which entitled the plaintiff to an injunction against a plain abuse of trust in the use of the property described in the deeds. The plaintiff claimed that because of this state of facts the giving of the deeds to the defendant was not a legal delivery with intent to pass the title. The court overruled the claim and rendered judgment for the defendant. It thus appears by the record that the facts found by the court, which support an action founded on a breach of trust, were held not relevant to the issue in the former action founded on possession of void deeds. The present action is based upon the breach of trust, and asks an injunction against a further breach; and the court below holds that this is the same cause of action adjudicated in the former suit.

In the first action, the plaintiff's right was to have void deeds in the possession of another, canceled. This right the law gives him, irrespective of any use that may be made of them. The law imposed upon the defendant a duty to surrender the deeds, however innocent her possession might be. The delict or wrong was a neglect to surrender the deeds. The remedy in such case is a compulsory surrender in court for cancellation. In the second action, the plaintiff's right is to have a trust, which had attached to a valid conveyance of land, enforced. The law imposed upon the

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defendant the duty of faithful performance of that trust. The delict or wrong was a violation of the trust by mortgaging the trust property and appropriating the proceeds to her own use. The remedy in such case is an enforced reconveyance of the property, or an injunction against the further abuse of the trust; the latter remedy is sought in this suit. I fail to see how two causes of action can be the same, when in each the right of the plaintiff, the duty of the defendant, the delict charged, and the remedy sought, are all different. It is suggested that identity consists in the primary right of a landowner to have an unclouded title. If we go back to such broad primary right as the operative test of the scope of a judgment, we lose our hold on the certainty which is essential to a judgment; but by that test the causes of action are not the same. In the present case the plaintiff seeks something very different from the enforcement of his primary right to an unclouded title. He seeks to compel the holder of a legal title to execute a trust. These deeds were drawn in 1884. The plaintiff's cause of action set up in the first case was complete upon the defendant's possession of the deeds. (The allegation that they had been placed on record was mere matter of aggravation, which could not alter or enlarge the cause of action alleged.) Had the plaintiff brought his first action in 1884 and the same judgment been rendered against him, would it for a moment be claimed that he could not now maintain his present action to enforce the execution of a trust under deeds then adjudged to be valid? Certainly in such case the two causes of action must be entirely distinct. How does the lapse of time affect the nature of the cause of action? During the intervening years a new and different cause of action has accrued. Why should not the plaintiff try, first, the cause of action that has existed since 1884; and second, the different cause of action that has intervened? It is said he cannot split a cause of action. True; the rule against this is strict and salutary. But it does not mean that he must join different causes of action, even when arising from the same transaction. The plaintiff might have joined the cause of action in this suit with the one stated in

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the former suit; but he could not have stated them as one cause of action. The allegation that he never executed or delivered the deeds, is essential to his cause of action in the first suit; and the allegation that he did execute and deliver the deeds, is essential in the second; but these allegations are contradictory and repugnant, and cannot both be alleged as facts supporting a single cause of action. The plaintiff could not, on the former suit, have tried the breach of trust now alleged, without stating it as a distinct cause of action. This he was not bound to do.

It appears upon record that the judge who tried the first case was of opinion that the plaintiff was entitled to recover in an action like the one now before us, and he rendered judgment against him because the facts potent to support this action were not relevant to the one then on trial. And it is now held that having proved those facts in the former action, where the court said they were not relevant, the plaintiff cannot prove them in this action. A record disclosing, so far as the opinion of the judge goes, the right of the plaintiff to the remedy now sought, is made, and apparently for that very reason, a bar to his asserting that right. It sometimes happens that a litigant's cause is so mismanaged that a court finds it impossible to discover a remedy. The plaintiff's cause may have been mismanaged, but he ought not to suffer unless the necessity is clear. For the reasons given, I think no necessity exists; that the Superior Court erred in sustaining the third defense; and that a new trial should be granted.

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JAMES MCQUILLAN *vs.* THE WILLIMANTIC ELECTRIC LIGHT COMPANY.

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First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The mere fact that an employee of an electric light company, while trimming a lamp at the top of a pole, did not support himself in precisely the same way that his instructor had done, cannot be held to be negligence, as matter of law. The question is not whether the employee performed his work in exactly the manner that his instructor did, but did he exercise ordinary care under all the circumstances.

To what extent the court should refer to or comment upon the evidence, in submitting to the jury a question of fact, is within the fair discretion of the trial judge.

In an action against a corporation by an employee to recover damages for personal injuries alleged to have been caused by its negligence, the defendant offered to show that it was protected by insurance against loss from the plaintiff's claim. This evidence was offered as tending to prove that the defendant's superintendent, a witness, had no motive to testify untruthfully. *Held* that inasmuch as it did not appear that the witness knew that such insurance had been effected, the fact of its existence could have had no influence upon his mind, and the evidence was therefore properly rejected.

Whether under other circumstances such evidence would have been admissible, *quære*.

[Argued May 3d—decided July 26th, 1898.]

ACTION to recover damages for personal injuries received through the claimed negligence of the defendant, brought to the Superior Court in Windham County and tried to the jury before *Shumway, J.;* verdict and judgment for the plaintiff for $1,200 damages, and appeal by the defendant for alleged errors in the rulings and charge of the court. *No error.*

The plaintiff claimed to have proved that on the 4th of September, 1896, he was employed by the defendant as a trimmer and cleaner of its electric lamps, under a contract made with his brother John McQuillan, defendant's foreman, who was authorized to make such contract by Edwin Evans, defendant's manager at Willimantic; and that on the 6th of September, while preparing to trim an arc light, the cross-

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bar of the pole, by reason of the rotten condition of the top of the pole, gave way, and the plaintiff fell to the ground, a distance of about thirty feet, and was seriously injured.

The defendant claimed to have proved that the injury was not caused by the defendant's negligence, but by the plaintiff's negligence, and that the plaintiff was not in defendant's employ at the time of his injury.

It appeared in evidence that one Doyle, who was employed by the defendant as a trimmer of electric lamps, and who was familiar with the work, had given notice that he intended to leave the defendant's employ on Saturday the 5th of September, and that John McQuillan was desirous to have his brother, the plaintiff, secure Doyle's place; that on the 4th of September the manager, Evans, who was in Spencer, Massachusetts, by telephone directed the bookkeeper, Miss McCullough, to tell John McQuillan to employ one Williams to take Doyle's place, and that John McQuillan, when so informed by the bookkeeper, replied that he should not get Williams, and that Evans knew he wanted his brother to have the place; and that later that day John McQuillan and Evans conversed by telephone, concerning which conversation the testimony of John McQuillan and Evans, who were witnesses at the trial, was conflicting, the former testifying that Evans told him to go ahead and employ his brother, and that he thereupon employed him, and the latter that he told McQuillan to leave the matter until he, Evans, returned.

Evidence was introduced from which the defendant claimed that the plaintiff, at the direction of his brother, the day before the accident, went with the said Doyle to receive instructions how to perform his work; that Doyle in instructing the plaintiff did not throw his leg over the cross-bar while upon the pole, but that the plaintiff did throw his leg over the cross-bar when he was injured. A witness of the defendant testified that the usual and proper position upon the pole in trimming these lights was to throw one leg over the cross-bar.

The defendant requested the court to charge the jury as

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follows: "If from a fair preponderance of evidence you find that on the 6th day of September, 1896, the plaintiff was in the employ of the defendant to transact duties in the capacity in which he was injured, and went around the day before with Lawrence Doyle to observe and be instructed in the discharge of his duties, and in being so instructed his instructor did not throw his leg over one of the cross-bars or arms, but so cleaned and trimmed the light that if the pole was defective where it broke there was no danger to the trimmer, and if upon the day of the accident, after such instructions on the part of Doyle, the plaintiff went up the pole and in a different manner from his instructions, and if by following his instructions no accident would have happened, the defendant is not liable."

The court did not so charge, but upon that point charged the jury "that if the plaintiff was informed that it was unsafe to throw his leg over the cross-arm and that he should not assume that position in trimming lamps, and if, contrary to the instruction given to him by the person who taught him to trim, he did take that position upon the pole, then, in that case, he would assume himself the risk of injury, and could not recover."

In charging the jury the court said, with reference to the question of fact whether the plaintiff at the time he was injured was an employee of the defendant: "The evidence upon that particular point rests mainly upon the testimony of Mr. Evans, on the part of the defendant, and upon that of the plaintiff himself and of his brother, as to the manner in which he was employed, if at all, by the defendant company. . . The evidence upon this point is very brief, resting mainly upon the testimony of the witnesses to whom I have referred, and perhaps also upon the testimony of Mrs. James McQuillan, upon some statement which she claims Mr. Evans made to her, 'that the plaintiff was in the employ of the defendant but a short time.' All that evidence, and the claims made therefrom, you will take into consideration, giving it such weight as you may think it entitled to."

The said Evans having testified that he never authorized

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John McQuillan to employ the plaintiff, the defendant offered to prove that it was fully insured against such injuries received by its employees as that received by the plaintiff, as tending to prove that Evans had no motive to testify untruthfully. The plaintiff objected to such evidence as immaterial, and the court excluded it.

The charge of the court, its refusals to charge as requested, and said ruling, are grounds of alleged error in the appeal.

Solomon Lucas, for the appellant (defendant).

Elliot B. Sumner and *Charles E. Searles*, for the appellee (plaintiff).

HALL, J. The record does not disclose that the plaintiff received any express instruction that it was unsafe for him, in order to support himself while at work upon the electric light pole, to throw his leg over one of the cross-arms. Evidence presented by the defendant showed that Doyle, who in behalf of the defendant instructed the plaintiff how to perform his duties, did not assume that position, but that the plaintiff at the time of his injury did. If the defendant knew that it was dangerous for a workman to so support himself by the cross-bar, the plaintiff should have been so informed, unless the danger was obvious. In the absence of such information, the court properly refused to charge the jury, as requested by the defendant, that the fact that the accident resulted from the use by the plaintiff of the cross-bar as a means of support, when it had not been so used by his instructor Doyle, would defeat a recovery by the plaintiff. The question was one of contributory negligence. The inquiry was, did the plaintiff exercise the care of a person of ordinary prudence, and not, did he perform the work in precisely the same manner that his instructor did. Throwing his leg over the cross-bar may have been a safer way to work than that adopted by Doyle; in fact one of the defendant's witnesses testified that the position taken by the plaintiff was the usual and proper one.

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The question of fact whether the plaintiff was in the employ of the defendant at the time of the accident, was by the charge of the court fairly and properly submitted to the jury in accordance with the provisions of § 1101 of the General Statutes, that the court "shall submit all questions of fact to the jury, with such observations on the evidence, for their information, as it may think proper, without any direction how they shall find the facts." The defendant complains because the court, in commenting upon the evidence upon this question, did not refer to the testimony of Miss McCullough. The court did not assume to state all the evidence which might have borne upon that point. The language of the court was that the evidence upon the subject rested "mainly" upon the testimony of Evans, and of the plaintiff and his brother. A judge in charging the jury is not required to review all the evidence which has been introduced, nor is it error to omit all comment upon the bearing and weight of the evidence. *Cohen* v. *Pemberton*, 53 Conn. 221, 235. The extent to which he should comment upon the evidence in submitting to the jury a question of fact, is within the fair discretion of the trial judge. *Setchel* v. *Keigwin*, 57 Conn. 473, 478; *State* v. *Duffy*, ibid. 525, 529; *Morehouse* v. *Remson*, 59 id. 392, 401.

The dispute as to the authority of John McQuillan to employ the plaintiff, related mainly to what was said by Evans by telephone to the foreman McQuillan. There seems to have been no controversy at the trial concerning the message of Evans to Miss McCullough or its delivery to the foreman, or his reply to her when the message was delivered. There was no occasion for the court to call the attention of the jury to what was conceded by the parties and understood by the jury. *Calkins* v. *Lockwood*, 17 Conn. 154, 173.

There was no error in excluding the evidence offered by the defendant, that it was protected by insurance against loss from injuries sustained by its employees by such accidents. This evidence was offered "as tending to prove that Evans had no motive to testify untruthfully." Unless he knew that such insurance had been effected, the fact of its exist-

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ence could have had no influence in his mind. No proof of knowledge was offered, nor was it claimed that the jury might infer it from his official connection with the company. The ruling was therefore correct, even if (as to which we express no opinion) the evidence would, under other circumstance, have been admissible. None of the reasons of appeal can be sustained.

There is no error.

In this opinion the other judges concurred.

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LEONARD D. FISK ET AL. *vs.* THE CITY OF HARTFORD.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

If the laches of a party make it difficult or impossible for the court to enjoin his adversary without inflicting great injury thereby, an injunction should be refused and the party be left to his remedy at law.

A riparian mill owner who has for many years knowingly permitted a city to take its water supply in gradually increasing quantities from the head-waters of the stream, by means of expensive reservoirs and distributing mains, is not entitled to an injunction to restrain such diversion. Nor will the delay of the mill owner in asserting his rights be excused or justified, merely because the city had until recently found it economical and convenient to return the greater part of the water thus taken, in the form of sewage, to the stream above his dam.

[Argued May 4th—decided July 26th, 1898.]

SUIT for an injunction to restrain the defendant from diverting the waters of Park river and its tributaries until the damages accruing to the plaintiffs from such diversion had been ascertained and paid, brought to the Superior Court in Hartford County and reserved by that court, *Shumway, J.*, upon the defendant's demurrer to the complaint, for the consideration and advice of this court. *Judgment sustaining demurrer to relief advised.*

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In one aspect of it this case has already been before this court. *Fisk* v. *Hartford*, 69 Conn. 375. After the decision in that case the plaintiffs filed in the Superior Court a substitute complaint which, as subsequently amended, is as follows: "1. The plaintiffs in January, 1892, became and ever since have been and still are the owners of a valuable mill property on the Park river in the city of Hartford, with mills upon both sides of the river, one upon Elm street and the other immediately opposite upon Wells street. They are the owners at that point and for a considerable space upon each side of it, of the banks of the river and of its bed, and the exclusive owners of the water privileges at that point. 2. The water power available at this point to the plaintiffs by means of their dam, is equivalent to about 200 horse power upon the average. 3. The said water privilege is an ancient one, having been established, used, and occupied as such for more than 250 years. 4. The value of the mill property in connection with the water privilege is $250,000, and the plaintiffs have established a large and profitable business thereon as millers, and the water power is sufficient, without the assistance of steam, to carry on the entire business of the plaintiffs as such millers. 5. The defendant is the owner of a large and important system of reservoirs for the use of the citizens of Hartford for domestic and other purposes. The water of all these reservoirs is communicated to a certain distributing reservoir, whence by leading pipes it is carried to the streets, houses, stores, and lands in the city, and heretofore has been nearly in whole returned to Park river above the plaintiffs' dam by the drains, pipes, and sewers of the city, and was heretofore made available thereby to the plaintiffs in the use of their said water privileges. The several reservoirs constituting said system have been used as aforesaid by the defendant, and without any agreement with the plaintiffs or their predecessors, from the dates of their construction respectively, as follows: Reservoir No. 1, called the distributing reservoir, January 2d, 1867; reservoir No. 2, during the year 1868; reservoir No. 3, October 30th, 1875; reservoir No. 4, during the year 1879; reservoir No. 5, dur-

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ing the year 1884; reservoir No. 6, October 1st, 1895. 6. All the water collected and carried by the city in all of said reservoirs is from brooks, streams, and springs which are tributary to Park river, to the current and flow of which the plaintiffs are entitled by their mill and riparian rights aforesaid. 7. Since the introduction of the system of water supply by said city referred to in paragraph 5, down to within a few months of the present time, the water collected in such reservoirs as they were severally completed and put in operation, has been largely if not entirely returned to said river, and made available for the use of the plaintiffs in the enjoyment of the said mill privileges as set forth in paragraph 5. 8. The city has recently, to wit, within about a year of the date of this complaint, built and completed a reservoir in the town of Bloomfield, known as the Tumble-down Brook reservoir, of very extensive area, in which the said city has accumulated and still continues to accumulate and hold vast quantities of water from the watersheds, streams, brooks and springs tributary to said Park river, and to whose usufruct the plaintiffs are entitled as aforesaid, and has connected the same by canals with said distributing reservoir, whence the said water has, until within a few months of this date, been returned to said river and made available for the uses of the plaintiffs in their mill work, as set out in paragraph 5. 9. The surface water flowing from all points this side of the distributing reservoir has, until the completion of the intercepting sewer hereinafter referred to, found its way either by direct surface flowage, or by the existing drains, pipes, and sewers of the city, into the Park river; some small portion of said surface water, however, and also a small portion of the water brought from the reservoirs is carried into Park river below the complainants' dam. 10. The said city has constructed and substantially completed, within a few months prior to the date of this substituted complaint, an immense intercepting sewer, designed to divert, and which does divert, all the surface water and all the water accumulated in said reservoirs which would otherwise flow into Park river above plaintiffs' dam, away from said Park river into

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the Connecticut river. 11. The proposed intercepting sewer is particularly described in an exhibit which, by reference, is made part of this complaint, and will be filed in court as 'Exhibit A.' 12. The accumulation of water in the system of reservoirs as aforesaid, and its distribution through drains and pipes into the Connecticut river as above set forth, diverts from said Park river and from the use of the plaintiffs in their mill privileges aforesaid, one half of the volume of water whose usufruct belongs to them, to their great injury and damage; and said injury and damage will be continuous and a constant and perpetual source of injury to the plaintiffs, unless such diversion is restrained by injunction. 13. Since the commencement of this action, and before the filing of this substituted complaint, defendant has connected all the aforesaid local drains and sewers, within the circuit reached and affected by the intercepting sewer, with said intercepting sewer, and has thereby and by taking the surface and other water which before had reached the river and was available and useful to the plaintiffs, and by diverting the waters of Park river and its tributaries into the defendant's reservoirs and pipes, already diverted a large part of the current and flow of said stream away from the plaintiffs, and has deprived them of its use, greatly to the plaintiffs' damage; and, unless restrained by your honorable court by injunction, the defendant threatens to continue said diversion and will continue the same, to the continuing and perpetual damage of the plaintiffs. 14. And the defendant has already taken and will continue to take this water supply from the plaintiffs in large part, and away from the use of their mill, and the defendant has taken and will continue to take, unless restrained by your honorable court, from the tributaries of Park river and from Park river, the supply of water to whose use the plaintiffs are entitled as aforesaid. And the defendant is diverting the water of Park river and its tributaries into its reservoirs and distributing pipes as aforesaid, from the use of the plaintiffs, and the defendant is exclusively using the said water so diverted, and will so continue to exclusively use the water so diverted, unless re-

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strained by your honorable court from such diversion and such use. 15. The defendant has never compensated nor paid in any way the plaintiffs for damages occasioned to them by defendant's appropriation of the water, or for the diversion of the current and flow of water to which they are entitled as aforesaid, nor have any steps or proceedings been taken to ascertain the amount of such damages, nor has any attempt been made to agree with the plaintiffs as to the amount of damages thereby occasioned, nor has any compensation ever been made to the predecessors of the plaintiffs in the ownership of the mill privileges aforesaid for such appropriation and diversion. The storage capacity of said reservoirs is as follows: No. 1, 146,000,000 gallons; No. 2, 284,000,000 gallons; No. 3, 146,000,000 gallons; No. 4, 601,000,000 gallons; No. 5, 94,000,000 gallons; No. 6, 800,000,000 gallons; No. 6 is the reservoir heretofore referred to as Tumble-down Brook reservoir. 16. The average daily consumption of said water by the defendant's water department is about 7,000,000 gallons. The plaintiffs claim: 1. An injunction restraining the defendant from diverting any water from the watershed to whose usufruct plaintiffs are entitled as aforesaid, by accumulating the same in reservoirs or otherwise, or from interfering in any way with the use by the plaintiffs of the waters of Park river or of any of its tributaries, until the damages accruing and hereafter to accrue to the plaintiffs from the diversion complained of shall have been ascertained and paid in accordance with law. 2. Such other and further relief as to equity may pertain."

To this complaint and to the relief sought the defendant demurred, and for causes of demurrer assigned the following: "*First.* Because the substituted complaints set forth no valid cause of action, and no grounds upon which an injunction should be granted against the defendant. *Second.* The entire substituted complaint is in substance the same and nearly identical in words with the original complaint as amended, except the averments that the defendant now has diverted or does divert water from the sources of

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Park river, and on said original complaint an injunction has been refused. *Third.* Because this court has already decided, in conformity with the advice of the Supreme Court of Errors, that the plaintiffs are not entitled to an injunction to restrain the defendant from making use of said intercepting sewer, and the injunction now asked for would interfere with the use of the same. *Fourth.* Because it appears from the substituted complaint that the defendant long since adopted a system of reservoirs for the water supply of the city of Hartford, and has since been engaged in storing water in said reservoirs and thereby furnishing water to its inhabitants, all with the full knowledge and consent of the plaintiffs, and the plaintiffs have fully waived all right to an injunction against such storage of water. *Fifth.* Because it appears from the substituted complaint that the plaintiffs seek to obtain an injunction which would cut off the water supply of the city of Hartford unless and until certain alleged damages shall have been ascertained and paid, and because there is no law of this State under which, upon the allegations of the substituted complaint, damages must be ascertained before such damages have ensued to the plaintiffs. *Sixth.* Because an injunction, on the facts, is unnecessary and inequitable. There are no allegations in the complaint to the effect that the city of Hartford is not responsible for all damages which may accrue to the plaintiffs, or to show that such damages are irreparable, and because the plaintiffs have adequate remedy at law. *Seventh.* Because the averments of the substituted complaint have already been passed upon by this court and the Supreme Court of Errors, and the cause of action now set forth is the same one as formerly alleged, to wit, the diversion of water from the sources of Park river and taking the same past the plaintiffs' dam to the Connecticut river, and the new complaint sets forth no new right or cause of action and no new grounds on which an injunction should issue. *Eighth.* The defendant demurs to the relief sought in the substituted complaint, because upon the facts alleged the plaintiffs are not entitled to the relief therein sought."

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The questions arising upon this demurrer are reserved for the advice of this court.

Lewis E. Stanton and *William J. McConville*, for the defendant (in support of the demurrer).

This court has decided that an injunction ought not to issue to restrain the city from making use of the intercepting sewer, or to prevent the city from disposing of sewage. How can the intercepting sewer be used in order to promote the health and cleanliness of the city without water to run through it? The supply of water to a large number of persons is a public purpose. Aqueduct companies and cities having a water system are under a public duty to furnish water. *Lumbard* v. *Stearns*, 4 Cush. 62. The city in furnishing a water supply is engaged in a public and governmental duty, and will not be arrested in the discharge of this duty by injunction. *Slaughter-house Cases*, 16 Wall. 36; *Mugler* v. *Kansas*, 123 U. S. 623, see page 658; *Munn* v. *Illinois*, 94 id. 124; *Taunton* v. *Taylor*, 116 Mass. 254; *Watertown* v. *Mayo*, 109 id. 315; *Commonwealth* v. *Alger*, 7 Cush. 52, see pages 85, 86; *Matter of Cheesbrough*, 78 N. Y. 232; *Russell* v. *Mayor*, 2 Denio, 461–474; *Bertholf* v. *O'Reilly*, 74 N. Y. 509; *Morgan* v. *Danbury*, 67 Conn. 484. The city cannot be a violator of the law at the very time it is acting under the law in order to promote the health of the people. That which the law authorizes cannot be a nuisance. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Baker* v. *Boston*, 12 Pick. 184; *Atwater* v. *Canandaigua*, 124 N. Y. 602. Mere consequential injuries do not amount to a taking of property for public use. Cooley's Const. Lim. 542–544. Even if the plaintiffs are entitled to compensation they have not sought the proper remedy. *Diamond Match Co.* v. *New Haven*, 55 Conn. 510; *Judge* v. *Meriden*, 38 id. 90; *Healey* v. *New Haven*, 47 id. 305. An injunction ought not to be granted in this cause, for the reason that the plaintiffs' right is doubtful, and they have full and adequate remedy at law for any consequential damages which may be inflicted upon them. *Hawley* v. *Beardsley*, 47 Conn. 571; *Dodd* v. *Hartford*, 25 id. 232;

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Sheldon v. *Center School District*, 25 id. 224. The plaintiffs, upon their own allegations, have waived all right to an injunction.

Henry C. Robinson and *William F. Henney*, for the plaintiffs (in opposition to the demurrer).

The complainant unquestionably sets up a valid cause of action. *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Parker* v. *Griswold*, 17 id. 288; *Harding* v. *Stamford Water Co.*, 41 id. 87; *Mason* v. *Hoyle*, 56 id. 256; *Kellogg* v. *New Britian*, 62 id. 232; *Stock* v. *Jefferson*, 38 L. R. A. 355. The allegations of the substituted complaint materially differ from those of the original complaint, notwithstanding the fact that, in describing the method made use of by the city to divert the stream, we may have employed many terms and expressions made use of in the original complaint. Nothing is said in the substituted complaint about any waiver, nor has any waiver been pleaded by the defendant. Of course, if any such waiver is relied upon, it should be pleaded by the defendant, and the burden would be on the defendant to support it by proper proof. This is a general rule of pleading, always insisted upon at common law, and by the spirit of the Practice Act. Besides the impriority of urging waivers, and estoppels, and acquiescence, in a demurrer resting upon matters which occurred "long since," in a case of this kind, the defense is not available even if properly pleaded. Lewis on Eminent Domain, § 648; *Higby* v. *N. J. R. Co.*, 20 N. J. Eq. 435; *Morris* v. *R. Co.*, ibid. 530. As the complaint shows that one of these reservoirs was completed within a few months of the bringing of this suit, and that one, No. 6, the largest of them all, and that No. 4, the next largest, and No. 5, were all built within twenty years, and as these three reservoirs appropriate three quarters of the stream which the city is now diverting from us, there could be no proof of lawful authority, even if the defendant has used proper forms of pleading. It has never been held that property of this character could be taken without just compensation, no matter what hardship might be inflicted by restraining the taking of such property when

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unauthorized by law. The same objection might have been urged in the case of *Harding* v. *Stamford Water Co.*, and was urged in substance. In that case precisely the same taking was complained of as in this instance, "that the taking of the water of the stream to supply the inhabitants of a village with water is a taking for public use admits of no question, nor can the power of the legislature to take property for such use be for a moment questioned." In that case the reservoir had been built and in operation for several years, and the Supreme Court advised that compensation should be made within a given time, or that a perpetual injunction should issue. The city also claims that the damages are not irreparable, and that the plaintiffs have adequate remedy at law. It would seem to be useless to make such a claim in view of the continuing nature of these damages and the adjudicated cases. *Gardner* v. *Newburgh*, 2 Johns. Ch. 161; *Hooker* v. *New Haven & N. Co.*, 24 Conn. 158; Tiedeman on Mun. Corp. p. 787, *n.* 1; *Hollingsworth* v. *Water Supply District*, 165 Mass. 188; *Proprietors* v. *Water Supply Co.*, 149 id. 478, 484; *Hart* v. *Aqueduct*, 133 id. 488; *Cowdry* v. *Woburn*, 136 id. 409, 411; *Middletown* v. *Browning Co.*, 27 Mich. 533; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Danbury & N. R. Co.*, 37 Conn. 109; *Woodruff* v. *Catlin*, 54 id. 277; *Morgan* v. *Danbury*, 67 id. 484; *Imlay* v. *Union Branch R. Co.*, 26 id. 249; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146. There can be no successful claim of *laches* on our part of this case. *Laches* always depends upon circumstances, and, where there is a reasonable excuse for delay, the delay is not imputed to the party as an act of *laches*. *Griswold* v. *Hazard*, 141 U. S. 260; *Hammond* v. *Hopkins*, 134 id. 224; *Wetsall Cases* v. *Minn. T. R. Co.*, 56 Fed. Rep. 923, 65 id. 29. As to when *laches* and limitations begin to run, see 1 Wood on Lim. (2d ed.) 450, 461, note, 462, note; *Backhouse* v. *Bonomi*, 1 El. B. & S. 910; *Polley* v. *McCaull*, 37 Ala. 20; *Arnold* v. *Hudson River R. Co.*, 55 N. Y. 661; *Wagner* v. *Jermaine*, 3 Denio, 306; *Uline* v. *N. Y. C. & H. R. Co.*, 101 N. Y. 98; *Bare* v. *Hoffman*, 79 Pa. St. 71; *Thayer* v. *Brooks*, 10 Ohio, 489.

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TORRANCE, J. The principal question upon this reservation is not whether, upon the facts alleged, the plaintiffs are entitled to any remedy, nor if so to what remedy, but it is whether they are entitled to the specific remedy by way of injunction claimed by them.

The defendant under its second, third and seventh causes of demurrer contends, in substance, that this court has already decided this question against the plaintiffs in the case of *Fisk* v. *Hartford*, 69 Conn. 375. In support of this contention it is claimed that the present complaint is substantially the same as the original complaint; that it sets forth no new facts, and no new grounds on which an injunction should issue; and that the prayer for relief is substantially the same as in the former case.

We think the case referred to does not decide the question raised here, and that a comparison of the original complaint and prayer for relief with the present complaint and prayer for relief, clearly shows that the defendant's contention is not well founded. The original complaint in substance and effect prayed that the city might be restrained from disposing of its sewage through the intercepting sewer, and this court said that prayer ought not to be granted. The present complaint prays that the city may be restrained from diverting the waters of Park river and its tributaries into the reservoirs and leading pipes of the city, to the injury of the plaintiffs' rights; and the question whether, upon the facts now stated, this prayer should be granted, was neither considered nor decided in the former case, and is now for the first time properly before this court.

We also think that the present complaint states a valid cause of action for damages at least, and that it sets out such facts as would ordinarily entitle the plaintiffs to the equitable relief here sought, unless it also shows that they have delayed so long in applying for it as to make it inequitable now to grant it. The only question, therefore, raised by the demurrer, which we deem it necessary to consider at any length, relates to the *laches* or delay of the plaintiffs and their predecessors in title in seeking this remedy.

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The city began to construct its present system of reservoirs for the storage of the waters of Park river and its tributaries, and to divert said waters into such reservoirs and distribute it for public use, more than thirty years ago. The first reservoir was built in 1867, the second in 1868, the third in 1875, the fourth in 1879, the fifth in 1884, and the sixth in 1895. These reservoirs have an aggregate storage capacity of nearly twenty-one hundred million gallons. As they were constructed from time to time the waters of Park river and its tributaries were diverted into them and accumulated therein, and distributed therefrom to the city and its inhabitants for their use. The city during these thirty years has expended very large sums of money in completing its present system of waterworks, including the reservoirs aforesaid, the distributing mains and pipes and its sewerage system; and the city is now and for many years past has been practically dependent upon said waterworks for its supply of water for domestic use, for protection against fire, and for all other purposes for which water is used in cities. All that the city has thus done during the past thirty years in the construction of its system of water supply, and in the use of the waters of Park river and its tributaries, was done with the knowledge of the plaintiffs and their predecessors in title, but without any agreement with them, and without objection from them until about 1895 or 1896. In the latter year the plaintiffs brought this suit; but, as before stated, it was brought originally not, as now, to prevent the city from diverting the waters of Park river into its reservoirs, but to prevent it from emptying its sewage into the intercepting sewer.

It is, however, further admitted by the pleadings, that until the intercepting sewer was built and used, the city returned to Park river, above the plaintiffs' dam, through its sewer pipes, substantially all the water diverted into its reservoirs, and the important question in the case is whether this fact furnishes a sufficient excuse or justification for the delay of the mill owners in asserting their rights. Upon the admitted facts we think it is clear that the rights of the mill

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owners were invaded by the first substantial diversion of these waters in 1867, and they were violated by each subsequent diversion into the new reservoirs as they were built and used from time to time. The water was diverted, not with a view of returning it as water into Park river again, but in contemplation of the fact that it would be used and disposed of as the city saw fit; with the certainty that it would be converted into sewage which the city would have no right to pour into Park river to the detriment of the riparian proprietors, and which it would have the right to carry elsewhere. As against these mill owners and other riparian proprietors along this river, the city had no right either to divert or to pollute its waters to the detriment of such proprietors, without their consent and without compensation made for the injury. The fact that the city emptied its sewage into Park river above the dam, and thus lessened the damages which would otherwise have been caused to the mill owners by the diversion of its waters, did not make the diversion and pollution of its waters any the less an invasion of the rights of the mill owners. The city emptied its sewage here as a mere matter of convenience and to save expense. It could cease to do so when it chose, it could be compelled to carry it elsewhere or pay for the privilege of emptying here, and the mill owners had no right to have it emptied here.

We think it is clear that when the city first began to divert this water to the detriment of the mill owners, without their consent and without making compensation to them, it was an invasion of their rights, even though the city did return the water so diverted, in the shape of sewage, into the river above the dam; it was such an invasion of their rights as would have been enjoined against in a proper proceeding upon sufficient proof, and the fact that the water was so returned as sewage would have been no defense in such a proceeding. This invasion and violation of the rights of the mill owners has been continuous since 1867, and it has grown in extent with the growth of the city and the use of

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each new reservoir. So far then as the right to an injunction is concerned, the mill owners have slept upon their rights during all these years with full knowledge of all the facts. The fact that they were willing to accept the sewage of the city upon sufferance and at the will of the city, in place of the water to which they were entitled as of right, furnishes we think no legal excuse for this long delay in asking for an injunction. They now ask a court of equity to cut off the entire water supply of a great city until it pays them the damages to which they shall prove themselves entitled. The city is and will continue to be abundantly able to pay all such damages, and the remedy of the plaintiffs at law to recover such damages is adequate and complete. To cut off the entire water supply of this city for any considerable length of time, would cause great public inconvenience and suffering, and would greatly endanger the lives and property of its inhabitants in case of fire, or from disease. The granting or refusal of an injunction rests in each particular case in the sound discretion of the court, exercised according to the recognized principles of equity. It ought not to be granted where it would be productive of great hardship or oppression, or great public or private mischief. *Hawley* v. *Beardsley*, 47 Conn. 571; *Logansport* v. *Uhl*, 99 Ind. 531.

It is a well established rule in equity that if a party is guilty of *laches* or unreasonable delay in applying for an injunction, he may thereby forfeit his claim to that special form of remedy; and where in such case, by his *laches*, he has made it impossible or very difficult for the court to enjoin his adversary without inflicting great injury thereby, an injunction should be refused and the party left to his remedy at law. *Traphagen* v. *Jersey City*, 29 N. J. Eq. 206; *State* v. *Paterson*, 40 N. J. L. 244; *Logansport* v. *Uhl*, *supra*; *Tash* v. *Adams*, 10 Cush. 252; 2 Pom. Eq. § 817.

Applying these principles to the facts in this case, we think an injunction should not be granted. Great harm would or may result to the city and its inhabitants if an injunction

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should be granted, and little or none can result to the plaintiffs if it is refused.

The Superior Court is advised that the demurrer upon this point should be sustained, and that an injunction should be refused.

In this opinion the other judges concurred.

DENNIS SULLIVAN *vs.* ROLLO L. SHAILOR.

First Judicial District, Hartford, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

An undisclosed principal may maintain an action in his own name against a third person, to recover for labor and materials furnished the latter under a contract made with him by the principal's agent; but the defendant, under such circumstances, will be entitled to all the equities, set-offs, and other defenses of which he might have availed himself had the action been brought in the name of the agent.

[Submitted on briefs May 6th—decided July 26th, 1898.]

ACTION to recover for work and labor and materials furnished, brought to the Court of Common Pleas in Hartford County and tried to the court, *Case, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *Error and new trial granted.*

The following facts were found by the court: "1. The plaintiff is a builder of Hartford, who at some time prior to any of the transactions upon which this suit is based, entered into an agreement in writing with one John McKenna, engaging McKenna to act as his, the plaintiff's, agent in making contracts for work incidental to the business, which arrangement has ever since been and still is in force between said parties. 2. The defendant was no party to this arrangement, had no notice of it, and knew nothing of its existence

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either before or during the period covered by his dealings with the said McKenna, as hereinafter found. 3. In July and August, 1897, at the defendant's instance, the said John McKenna undertook certain work for the defendant, and a verbal contract was entered into between the defendant and McKenna whereby the latter was to perform certain services and furnish certain materials in the construction of certain buildings which the defendant proposed erecting. Said contract was of a kind which said McKenna had full authority to make as agent, under the terms of his said agreement with the plaintiff, Sullivan. 4. Said contract was fully performed, and the services and materials rendered and furnished thereunder have not been fully paid for by the defendant, and this suit is brought to recover the balance due. 5. In all said transactions between the defendant and said McKenna, there was no disclosure or suggestion by McKenna, and no knowledge on the defendant's part, that McKenna claimed to be acting other than on his own account and behalf; nor did McKenna disclose in any manner that his claimed position was that of an agent either for the plaintiff or for any person whose identity was not made known to the defendant. Upon these facts the plaintiff claimed and asked the court to hold, as matter of law, that John McKenna's contract with the defendant was the contract of Dennis Sullivan, as an undisclosed principal, and that the defendant was holden thereunder to said Sullivan. The court declined so to hold, but did hold that Sullivan was no party to the contract relied upon, and rendered judgment for the defendant."

The refusal of the court to rule as requested, and the ruling and decision of the court as stated in the finding, are the grounds of the plaintiff's appeal.

Andrew J. Broughel, Jr., for the appellant (plaintiff).

The plaintiff, as an undisclosed principal, had the right to maintain an action on these contracts. *Thomson* v. *Davenport*, 2 Sm. L. Cas. (5th Am. ed.) 358; Pollock on Cont. (4th ed.) 168; 1 Amer. & Eng. Ency. of Law (1st ed.), 423,

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424; 1 Amer. & Eng. Ency. of Law (2d ed.), 1168; Sto. on Agency, 192; *Sims* v. *Bond*, 5 B. & Ad. 389; *Huntington* v. *Knox*, 7 Cush. 371; *Sutton* v. *Mansfield*, 47 Conn. 388; *Merrill* v. *Kenyon*, 48 id. 314. If the defendant had any defense good against McKenna he might have availed himself of it in this action; but he could not defeat the action by proving that he did not know that McKenna was acting as the plaintiff's agent.

Albert C. Bill and *Joseph P. Tuttle*, for the appellee (defendant).

There was no contractual relation between the plaintiff and defendant, nor did any consideration move from the plaintiff, nor is it known that the plaintiff had anything to do with the performance of the contract sued upon. Without such relationship, and without such consideration, the plaintiff cannot maintain his action. *Nat. Life Ins. Co.* v. *Allen*, 116 Mass. 401; *Boston Ice Co.* v. *Potter*, 123 id. 28. Sullivan should have notified the defendant that the contract of McKenna was his contract, and his failure so to do until after the completion of the same is an evidence of bad faith. *Bingham* v. *Peters*, 1 Gray, 147; *United States* v. *Parmelee*, Paine, 252. This case is distinguished from the line of cases in which an undisclosed principal can maintain an action in his own name, by the fact that it was an executory contract in which the character, ability, knowledge and skill of the particular person with whom the contract is made is the consideration which leads the other party to enter into it. It will scarcely be questioned that a man has a right to choose the persons with whom he shall deal, nor that he has the right to refuse to deal with such persons as he does not wish to deal with. *Boston Ice Co.* v. *Potter*, *supra*; *Winchester* v. *Howard*, 97 Mass. 305; *Robson* v. *Drummond*, 2 B. & H. 303; *Humble* v. *Hunter*, 12 Q. B. 317; *Fenty* v. *Stewart*, 5 Sanf. N. Y. Sup. Ct. 101; *Lansden* v. *McCarthy*, 45 Mo. 108. We know of no class of contracts in which confidence in the contractor plays so important a part as in that of house building. The usual ignorance of the owner, and the great facil-

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ities for cheating, render such contracts conspicuously a class wherein a party has a right to choose his contractor.

HALL, J. The contract of an agent within the scope of his authority and for the benefit of his principal, is generally enforceable by the latter only, and in the same manner as if made by him in person. But a third party, though dealing with an agent who is acting within the limits of his power and for the benefit of his principal, is not compelled against his own wishes to contract with either a known or unknown principal. He may in such cases contract with the agent in his personal capacity, to the exclusion of the principal, and when it is clearly shown, either from the terms of the agreement or by the attendant circumstances, that the contract was exclusively with the agent personally, the principal does not become a party to the contract and cannot sue upon it in his own name. Story on Agency, § 423; Mechem on Agency, § 771; *Humble* v. *Hunter*, 12 Q. B. 310; *Winchester* v. *Howard*, 97 Mass. 303.

When an agent, within the limits of his authority and for the benefit of his principal, enters into a contract not under seal, with a third person, either without disclosing the fact of his agency, or, if that fact be disclosed, without disclosing the name of his principal, as a general rule suit may be instituted by either the agent or the principal for the enforcement of such contract. But as the reason of the rule which permits the principal to sue in such cases in his own name, is that he is entitled to the ultimate benefit of the contract made by his agent, so in seeking to recover that benefit he must assume the position of the agent whose contract he is enforcing, and the action so instituted by him is open to the defenses which might have been interposed to a suit commenced by the agent at the time the principal first sought to enforce the contract. Story on Agency, § 340; Mechem on Agency, §§ 769–773; *Sims* v. *Bond*, 5 B. & Ad. 389; *Ford* v. *Williams*, 21 How. U. S. 287; *Ilsley* v. *Merriam*, 7 Cush. 242; *Huntington* v. *Knox*, ibid. 371; *National Life Ins. Co.* v. *Allen*, 116 Mass. 398; *Ludwig* v. *Gillespie*, 105 N. Y. 653.

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In *Foster* v. *Graham*, 166 Mass. 202, CHIEF JUSTICE FIELD, in giving the opinion of the court, says: "In *Barry* v. *Page*, 10 Gray, 398, it is said: 'As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let in to all the equities, set-offs and other defenses to which he would have been entitled, if the action had been brought in the name of the agent.'"

The right of the principal to sue upon a contract made by an agent without disclosing his principal, was recognized by this court in *Sutton* v. *Mansfield*, 47 Conn. 388.

The law will not, however, extend to an undisclosed principal the right to perform himself the executory contract of his agent which involves a personal trust or confidence imposed in the latter by the other contracting party. But if a contract so made by a third party in consideration of the personal character, ability or skill of the agent, has been fully performed by the latter, or if performance by the principal has been accepted, there would seem to be no reason why the undisclosed principal should not be entitled to enforce by an action against the third party, a performance by him of his part of the contract. Mechem on Agency, § 770; *Boston Ice Co.* v. *Potter*, 123 Mass. 28; *King* v. *Batterson*, 13 R. I. 117; *Eggleston* v. *Boardman*, 37 Mich. 14.

From the finding of facts in the case at bar, it appears that McKenna, as an agent of the plaintiff, but without having disclosed either the name of his principal or the fact of his agency, contracted as an apparent principal with the defendant to furnish materials and render services in the construction of certain buildings. The undertaking of McKenna has been fully performed, but the sum due from the

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defendant has not been fully paid. This action is to recover the balance due. As the answer is a general denial, there was apparently no claim by the defendant of payment to McKenna, or a right of set-off against him, and there is no fact found indicating that it would work an injustice to the defendant if he should be required to pay to the plaintiff the full amount of his claim. The contract was not by its terms made solely with the agent personally, to the exclusion of any principal, nor are the facts surrounding the making of the contract such as to show a desire on the part of the defendant to deal with McKenna personally and exclusively. The case presented is simply that of a principal claiming the right to sue in his own name upon a contract made for his benefit by his authorized agent with a third party, who had no knowledge of the agency, and who dealt with the agent as an apparent principal. The plaintiff is in law a party to the contract which was so made by his agent, and may maintain an action upon it upon the facts before us.

There was error in the ruling of the court that the plaintiff was not a party to the contract made by McKenna with the defendant, and a new trial is granted.

In this opinion the other judges concurred.

70 738
71 164

CHARLES S. JOHNSON *vs.* SAMUEL F. ALLEN.

Second Judicial District, Norwich, May Term, 1898. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and HALL, Js.

The defendant guaranteed the due performance by *N* of the obligations assumed by him in a contract made with the plaintiff. After a lease to *N*, in the usual form, of premises owned by the plaintiff and consisting in part of a grist-mill, the contract provided that the plaintiff should buy grain for *N* to grind and sell at the mill, for which *N* should pay the cost price at the railroad station in his town and one cent per bushel in addition; that payments should be made to the plaintiff once each month for the grain sold by *N* during the

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month immediately preceding; and that *N* should be responsible for all grain sold, should collect all bills therefor, and should sell to whom he saw fit. *Held* that upon a proper construction of this contract *N* was a bailee and liable as a purchaser, not for all grain delivered to him by the plaintiff, but only for such part thereof as he himself had sold or disposed of; and therefore the defendant, *N's* guarantor, could not be held liable upon a complaint which charged the transaction as an ordinary sale, and entirely failed to aver any default or nonpayment by *N* for grain sold by him.

[Argued May 31st—decided July 26th, 1898.]

ACTION against a guarantor to recover the value of grain furnished his co-obligor, brought to the Superior Court in New London County and tried to the court, *Shumway, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

In August, 1894, the plaintiff and Norman C. Allen entered into a certain indenture of lease in the ordinary form in use in this State, in and by which the plaintiff leased to the said Allen, for the term of one year from September 1st, 1894, certain premises in the town of Montville, consisting of land with a house, barn, sawmill and grist-mill thereon standing. Said indenture also contained the following agreement: "It is further understood and agreed between the parties hereunto, that the said party of the first part shall buy grain for the said party of the second part to grind and sell at the above described premises, but not in speculative quantities, said grain to be delivered to the said party of the second part on the cars at the Montville depot, so-called, on the Central Vermont Railroad; and said party of the second part hereby agrees to pay for the said grain the cost price at said depot and one cent (.01) per bushel, additional for each bushel bought, and the said party of the second part agrees to pay the said party of the first part once each month for the grain sold by the said party of the second part during the month immediately preceding; and it is further understood that the party of the second part shall be responsible for all grain sold, shall collect all the bills for the same, and shall sell to whom he sees fit.

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"It is understood further between the parties hereto, that the party of the first part shall be in no way responsible for delay in the transit of grain nor for demurrage that may be charged for leaving cars too long loaded."

The contract of guaranty sued upon, duly signed by the defendant Samuel F. Allen, forming a part of said indenture and executed concurrently with it, reads as follows: "For and in consideration of the letting of the premises above described and for value received, I guarantee the punctual payment of the rent and performance of the covenants in the above agreement mentioned, to be made and performed by said lessee, without requiring any notice of non-payment or non-performance, or proof of notice or demand being made whereby to charge me therefor."

The complaint alleged in substance that Norman C. Allen, under and by virtue of said indenture, had "purchased grain of plaintiff to the amount of $4,000;" that he had neglected and refused to pay to the plaintiff monthly the money due to the plaintiff; that he now owed the plaintiff for grain sold and delivered under said agreement the sum of $2,000; that the plaintiff had delivered said grain to Norman C. Allen relying upon said guaranty; that the plaintiff had performed all the conditions of said indenture on his part to be performed; and that the defendant now owed the plaintiff $2,000. The indenture and contract of guaranty were made, by reference, a part of the complaint, as Exhibit A.

The plaintiff also filed a bill of particulars purporting to set forth the state of the account between himself and Norman. It charged Norman with grain furnished to him, to the amount of about $3,700, with rent $375: and with other things which together make a total of $4,317.77; and it credited him with certain payments and other items which amounted in the whole to $2,137.59.

The defenses were three in number. The first admitted the execution and delivery of the contracts contained in Exhibit A, and denied all the other allegations of the complaint. The second set up the fact that after the indenture was delivered, Norman and the plaintiff, on the 18th

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of December, 1894, without the consent of the defendant, had entered into a contract in writing, made a part of the defense, by reference, as Exhibit B, which modified and altered the agreement in the indenture on which the suit was brought; and that Norman had fully paid the plaintiff for all the items charged in the bill of particulars which were furnished prior to the 18th day of December, 1894.

Exhibit B, above referred to, reads as follows: "In consideration of promises made by Chas. S. Johnson in a lease dated the 22d day of August, 1894, to supply grain, hay, middlings *&c.* it is hereby agreed and understood that whatever said Johnson may buy and has already bought is now and is to remain his property, with all book accounts I may have for the above described goods sold on credit, until actually paid for by me. Dated at Montville Connecticut this 18th day of December, 1894. (Signed), Norman C. Allen."

The third defense set up, in substance, a breach by the plaintiff of his agreement with Norman to buy and deliver grain, to the damage of Norman $2,000, and claimed that this sum should be applied in reduction of plaintiff's claim against Norman, stated in the bill of particulars. To the second and third defenses the plaintiff demurred, but the court overruled the demurrer, and the plaintiff then denied the matters set up in both answers.

The following is the substance of the finding made by the trial court: In August, 1894, the plaintiff and Norman entered into the indenture of lease aforesaid, and the defendant executed and delivered to the plaintiff the contract of guaranty aforesaid. Norman occupied the leased premises after September 1st, 1894, and until September 1st, 1895. Said contracts remained unchanged until December 18th, 1894, when the plaintiff, without the consent or knowledge of the defendant, requested and received of Norman the contract set out in Exhibit B. The lease mentioned in said Exhibit B is the indenture of lease aforesaid. The defendant had no knowledge of Exhibit B until after this suit was brought. The contract contained in Exhibit B continued in

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full force as long as the plaintiff and Norman had any dealings with each other. Prior to the execution of Exhibit B the plaintiff furnished grain in the quantities and at the times stated in the bill of particulars; and after its execution the plaintiff, under it, furnished hay and grain at the times stated in his bill of particulars. Norman made payments to the plaintiff of the amounts and at the dates mentioned in the bill of particulars. All the rent has been paid by Norman, except the $75 due September 1st, 1895.

The finding concludes as follows: "No evidence was offered to prove, and I do not find that any grain or hay furnished at any time by the plaintiff to said Norman has been sold or disposed of by said Norman, except such as was paid for by him by the payments credited in the plaintiff's bill of particulars, and said bill of particulars correctly states the amount of hay and grain and the time when furnished."

Upon these facts the plaintiff requested the court to rule as follows: 1st. That the plaintiff was entitled to judgment. 2d. That the plaintiff was entitled to recover of the defendant the balance due to the plaintiff as shown by the bill of particulars. 3d. That if the court should find that the writing given on December 18th, was a material variance excusing the defendant from the further performance of the guaranty on his part, then the plaintiff was entitled to recover the amount due from the said Norman from August 22d, to said December 18th, 1894. 4th. That the plaintiff was entitled to recover of the defendant the amount due for rent during the occupancy of the said premises by the said Norman. 5th. That the plaintiff was entitled to recover of the defendant the sum of $746.42.

The court did not so rule, but overruled all of the claims of the plaintiff, and rendered judgment that the defendant recover his costs.

The errors assigned relate to the action of the court, (1) in overruling the demurrer, (2) in overruling the plaintiff's claims.

Charles W. Comstock, with whom was *Edwin C. Johnson, 2d*, for the appellant (plaintiff).

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Frank T. Brown, for the appellee (defendant).

TORRANCE, J. The principal questions in this case depend for their solution upon the construction of that part of the agreement between the plaintiff and Norman C. Allen which relates to the furnishing of grain by the former to the latter.

The plaintiff claims that when he furnished grain to Norman under the contract, the transaction was a sale; that the grain became Norman's upon delivery; and that thereupon, whatever subsequently became of the grain, Norman became liable for the price of the grain, to be determined and paid as provided for in the agreement. His complaint is based upon such a construction of the contract. It alleges that Norman "had *purchased* grain of the plaintiff to the amount of $4,000," and that $2,000 is now due to the plaintiff from Norman, "for grain sold and delivered" to him by the plaintiff under said agreement.

We are of opinion that this is not the true construction. It is clearly inconsistent with some of the terms of the contract. By the contract the plaintiff is to "buy grain for the party of the second part (*i. e.* Norman) to grind and sell" at the leased premises, to be delivered on the cars at the Montville depot; Norman is to pay for the grain the cost price at the depot, and one cent per bushel additional for each bushel bought; and Norman agrees to pay the plaintiff "once each month for the grain sold" by him during the month immediately preceding. Up to this point it might perhaps fairly be claimed that the delivery of grain under the contract was intended to be a sale, although such a construction would not even then be free from doubt. But the contract goes on to provide as follows: "And it is further understood that the party of the second part shall be responsible for all grain sold, shall collect all the bills for the same, and shall sell to whom he sees fit." These provisions are clearly inconsistent with the claim that the grain became Norman's when delivered under the contract. Norman agrees to pay only for what he sells, not for all that he re-

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ceives. He is expressly made responsible for the grain sold by him, and he is expressly empowered to sell it "to whom he sees fit," and expressly authorized and obligated to "collect all the bills for the same." If the grain became his upon delivery, these provisions are entirely unnecessary. We cannot, however, regard them as surplusage, nor ignore them. We must take the contract as a whole as we find it, and give effect if possible to all its terms; and we cannot do this if each delivery of grain under the contract is to be regarded as a sale.

We are of opinion that the contract is essentially one that contemplates a bailment of the grain upon each delivery, and not a sale. We think its essential provisions should be construed as follows: The plaintiff is to buy grain and deliver it to Norman; it is to remain the property of the plaintiff, but Norman may grind it, and may sell it to whom he sees fit, and for such price, on such terms, in such quantities, and at such times as he sees fit; he is, so far as sales by him are concerned, to be responsible only for what he sells or disposes of, and that, too, only to the extent of the price per bushel fixed by the contract; if he sells at a profit the gain is his, if at a loss the loss is his; and he and not the plaintiff is to collect the bills for grain so sold by him.

Under such a construction every delivery of grain to Norman was a bailment and not a sale. Norman agreed to pay, at the price fixed by the contract, only for such part of the grain bailed to him as he should sell or dispose of, and not for all that was bailed to him. This construction gives effect to all the terms of the contract and does violence to none of them.

Under such a construction the defendant would be liable, not for the default of Norman in failing to pay for all grain delivered to him, but only for his default in paying for all grain sold or disposed of by him. This being, as we think, the true construction of the agreement, it follows that there could be no recovery by the plaintiff in this action upon the present complaint. That, as we have seen, is based upon an entirely different construction of the contract. It alleges

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that the sum claimed is due from Norman for grain sold and delivered to him, and that Norman refuses to pay such sum; while at the same time it shows that the contract of guaranty sued upon covers no such default. Under the guaranty the defendant is not liable, so far as the grain is concerned, save for the default of Norman in paying for grain sold by him, and there is no allegation of any such default. The complaint is therefore fatally defective, for it shows upon its face that the default of Norman for which the plaintiff sought to recover, was not embraced within the contract of guaranty.

In addition to this the court below has found in effect, that whatever grain Norman may have sold or disposed of, he has fully paid for.

Upon the complaint and the evidence, then, the court reached the result that the plaintiff was not entitled to recover, and under the circumstances no other result was possible. This result was not and could not have been affected in any way by any of the rulings of which the plaintiff complains. Whether these rulings were right or wrong, they did not and could not affect the complaint, nor the contracts set up in it, nor the evidence, nor the finding that nothing was due from Norman for sales of grain; and these justify the judgment rendered, without reference to the effect of Exhibit B upon the contract of guaranty, or the question of counterclaim, or set-off, or anything else in the case.

The plaintiff's case against the defendant is and must be predicated upon some default of Norman's for which the defendant is responsible, embraced within the complaint, and the record fails to show any such default. It is upon this fact, and not upon the effect of Exhibit B, or any of the other questions in the case, that the judgment rests.

In this view of the case it becomes unnecessary to consider at all the rulings of which the plaintiff complains, for it is of no consequence here whether they were or were not erroneous; and upon the question whether they were right or wrong we express no opinion.

There is no error.

In this opinion the other judges concurred.

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MEMORANDA OF CASES

NOT REPORTED IN FULL.

MILES COMMANDER *vs.* MARY HAHN.

First Judicial District.

[Argued January 5th—decided January 7th, 1898.]

ACTION to recover for services rendered as a broker in the sale of real estate, brought to the Court of Common Pleas in Hartford County and tried to the jury before *Case, J.;* verdict and judgment for the plaintiff and appeal by the defendant for alleged error of the court in denying her motion for a new trial for a verdict against evidence. *No error.*

William F. Henney, for the appellant (defendant).

Sidney E. Clarke, for the appellee (plaintiff).

BY THE COURT. The opinion in the case of *Chatfield v. Bunnell*, 69 Conn. 511, controls the decision in this case.

SAMUEL J. CONE *vs.* JAMES T. SEDGWICK ET AL.

First Judicial District.

[Argued May 4th—decided May 5th, 1898.]

SUIT to foreclose a mechanics lien and for damages, brought to the Court of Common Pleas in Litchfield County, where the plaintiff was nonsuited in a trial to the court, *Welch, J.* Shortly after the return day the defendant Sedgwick filed a

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written motion asking that the plaintiff might be required to cite in one Beach as a co-defendant, for the reasons therein set forth, which motion, after a due hearing by the court, was granted. The plaintiff objected to the allowance of this motion and excepted to the ruling of the court thereon. After the judgment of nonsuit had been rendered the plaintiff filed two separate appeals to the Supreme Court of Errors: one from the ruling of the court upon the motion to cite in Beach as a co-defendant, and one from the refusal of the court to set aside the nonsuit.

In this court the appellees filed a plea in abatement and a motion to erase, in the first appeal, and a plea in abatement in the second, because the appeals were not taken to the term of court next to be held after they were filed. *Motion to erase granted, and plea in abatement sustained.* No opinion.

George A. Hickox and *Charles D. Burrill*, for the appellant (plaintiff).

George M. Woodruff and *Frederick M. Williams*, for the appellees (defendants).

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APPENDIX.

OBITUARY SKETCH OF JOHN W. WEBSTER.

JOHN WILKINSON WEBSTER was, at the time of his death—which occurred June 4th, 1896—the eldest member of the Waterbury bar, and had been in continuous practice in this State for more than half a century.

He came of Puritan stock, and was born in what is now West Hartford, January 19th, 1817. His ancestor, John Webster, of Worcestershire, England, was one of the original settlers of Hartford, and in 1656 was chosen Governor of the Connecticut Colony. The direct descendant of John Webster was Noah Webster, 1st, who was grandfather of the subject of this sketch. Noah Webster left two sons, Charles, the father of John W., and Noah, the great lexicographer.

The early training of Mr. Webster was received at Wilbraham and Westfield Academies; he entered the Yale Law School in 1842 and graduated in course in 1844. The year of his graduation he entered upon the active practice of law in Waterbury, filling the vacancy in the profession caused by the removal to New Haven of Judge Alfred Blackman. In those early days Waterbury was not one eighth of its present size, and prior to the advent of Mr. Webster there was for many years but one attorney in the place, Norton J. Buel.

For many years Judge Webster was in partnership with Charles W. Gillette, Esq., but in 1865 formed a partnership with his former pupil, John O'Neill, Esq., and in that year was founded the firm of Webster and O'Neill, which lasted to the time of his death.

Judge Webster was the fourth mayor of the city of Waterbury, 1854–55, was twice judge of probate for the district of Waterbury, was many years city attorney, town attorney, and member of the lower and upper boards of the city council. He was a life long Democrat of the old school. He was one of the charter members of the board of agents of the Bronson Library, for over fifteen years a member of the board of education, and for many years its chairman.

His life was steady and active, well ordered and temperate. A wife and daughter (Mrs. George M. Allerton) survive him.

At a meeting of the Waterbury bar, of which Mr. Webster had for many years been the presiding officer and its senior member, Ex-Mayor Greene Kendrick paid the following tribute to his memory: —

"Of that bright legal triumvirate of our city's earlier days—Buel, Blackman and Webster—the last has now been summoned before the final bar, where the judge of all knoweth all. To the brethren of his

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high profession, to his kinsman, his neighbors and his friends, he has left the sweet memory of a life lived honorably, rounded also by the thoughtful performance of its every duty.

"Though for these many years Judge Webster may be said to have anticipated the virtues which belong to age, he has yet lived long without knowledge of its infirmities. His lengthened life has added a bright ray to the common lustre of the profession which he loved so well. His name has increased not only the number, but the high character of his generation.

"Mr. Webster was wholly self-made. He owed himself to himself. This fact, more than all else, made him the substantial man he was. He was honest, industrious, plain in his dealings, and faithful in his every undertaking. He was blest with rare contentment of mind. In his constancy, fervency and zeal in daily life he had a persistency almost religious. At the performance of a clean deed he never hesitated, nor did he avoid the glad doing of a generous act. To his last days he carried a most genial love of nature, and to him, holding, as was his wont, frequent 'communion with her visible forms,' she ever spoke 'a various language.' 'He lived,' to borrow the quaint words of an old writer, 'unto the dignity of his nature, and he left it not disputable at last whether he had lived a man.' He made good the manly principles of his nature. He was exactly what he was made to be.

"Besides all this, the Judge lacked not of the broadest charity. If, as he looked upon them, he saw the imperfections of his fellows, he had for them only an excess of kindness. He gave, without envy, full credit to all that was laudable in the character of those with whose lives he came in contact. If he felt that he had been wronged by anyone, he drew the curtain of night upon his injuries, and let them 'be as though they had not been.'

"Judge Webster loved the profession of the law, not so much for its emoluments as for its dignity. He appreciated its wisdom. He was devoted to the principles of pure reason upon which its structure is wholly built. As for wealth, he possessed enough not to be poor. Content he was, if but rich enough to deserve and to attain success in the profession he so long adorned. His life exemplified the rule laid down by the great Latin jurist, for he 'lived honorably, injured no one, and gave to each his due.'

"His career had a wide latitude of years. His earthly journey traversed a long stretch of the world's tempestuous ocean. He had a right knowledge of earth. Experience told him what it was, what it could afford and what the living in it signified."

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INDEX.

ABATEMENT, PLEA IN.

To a complaint issued and dated March 27th, 1897, a summons signed by a justice of the peace was annexed, dated *October 27th, 1897*, commanding the defendant to appear and answer on the 3d day of April, 1897. *Held* that the action was not abatable by reason of the error in the date of the summons. *Schroeder* v. *Tomlinson*, 348.

See also APPEAL TO THE SUPREME COURT, 9.

ACCEPTANCE. See AGENCY, 1, 3; QUANTUM MERUIT, 2.

ACTION.

1. Under the provisions of the charter of the city of New Britain (10 Special Laws, pp. 133–136), the pendency of an appeal from an assessment of damages and benefits caused by the layout of a highway, taken by certain landowners, does not prevent another landowner who is not a party to such appeal and whose land has been actually taken and used for highway purposes, from suing the city and recovering the damages awarded to him. *Roper* v. *New Britain*, 459.
2. The amount recoverable in such an action is the full sum awarded as damages, and not such sum less the amount assessed against the plaintiff as benefits. *Ib.*
3. It is not necessary to the institution or prosecution of a suit by *prochein ami*, that the infant should have authorized or consented to the action. *McCarrick* v. *Kealy*, 642.
4. A cause of action consists of a right belonging to the plaintiff, and some wrongful act or omission by the defendant by which that right has been violated. *Wildman* v. *Wildman*, 700.

See also AGENCY, 4; APPEAL TO THE SUPREME COURT, 14; INSANE PERSONS, 1, 2; JUDGMENT, 6; JURISDICTION, 1; NEGLIGENCE, 5; PLEADING, 5; TRESPASS.

ACTION OF ACCOUNT. See PARTNERSHIP, 1.

ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS, 1, 2.

ADULTERY. See DIVORCE, 4.

ADVERSE POSSESSION.

A life tenant cannot acquire title to the premises by adverse possession, against the owner of the reversion, since his occupancy is justified under his paramount title. *Schroeder* v. *Tomlinson*, 348.

AGENCY.

1. A town treasurer cannot bind the town by his acceptance of an illegal town order. *Goodwin* v. *East Hartford*, 18.
2. There can be no ratification of an unauthorized act, unless all the facts are known and an intent to ratify exists. *Ib.*
3. In the case at bar the plaintiff alleged that the defendant town and

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AGENCY—*Continued.*
its treasurer intended to pay certain illegal orders drawn against the latter by a highway board; and the answer averred that several annual reports of the selectmen, treasurer and other town officials, containing these orders as a liability of the town, were accepted by the town. *Held* that these allegations did not show a ratification by the town of the acts of the highway board. *Ib.*

4. An undisclosed principal may maintain an action in his own name against a third person, to recover for labor and materials furnished the latter under a contract made with him by the principal's agent; but the defendant, under such circumstances, will be entitled to all the equities, set-offs, and other defenses of which he might have availed himself had the action been brought in the name of the agent. *Sullivan* v. *Shailor*, 733.

See also EMBEZZLEMENT, 1, 2; EVIDENCE, 1, 2, 7, 9; HIGHWAYS, 1; SALES, 1, 3.

ALIENS. See TAXATION, 1, 2, 4.

AMENDMENT.

1. It is the duty of the trial court to see that a complaint which contains the common counts only, is amended before the cause is heard, by striking out all of the counts to which the plaintiff's bill of particulars does not relate. *Brewster* v. *Aldrich et al.*, 51.

2. It is within the discretion of the trial court to refuse an amendment of the complaint enlarging the issue, if offered at a late stage of the trial. *Wildman* v. *Wildman*, 700.

APPEAL. See ACTION, 1; GRADE CROSSINGS, 1; RECEIVER, 6.

APPEAL FROM PROBATE.

1. It is no part of the duty of a trustee in insolvency to appeal from the refusal of the Court of Probate to grant his application for an extension of the time within which alleged creditors of the insolvent might present their claims to commissioners; nor has the trustee such an interest, personal or representative, as entitles him, under the statute, to take such an appeal. *Woodbury, Trustee, Appeal from Probate*, 455.

2. Such an appeal, if taken by the trustee, will be erased from the docket of the Superior Court upon motion of the appellee. *Ib.*

APPEAL TO THE SUPREME COURT.

Findings as to negligence.

1. The conclusions of the trial court as to negligence and contributory negligence cannot be reviewed upon appeal, unless it appears that an incorrect standard of duty was applied, or some rule or principle of law, applicable to the facts found, was violated. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.

Insufficient assignment.

2. A statement in the reasons of appeal that the trial court erred in reaching a certain conclusion upon the evidence in the case, is insufficient as an assignment of error, in that it fails to specifically and distinctly point out any error of law. *Anderson et al.* v. *New Canaan*, 99.

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APPEAL TO THE SUPREME COURT—*Continued.*

Record; memorandum of decision.

3. The memorandum of decision forms no part of the official record, unless made such by the finding. *Cummings* v. *Hartford*, 115.

Resort to memorandum of decision.

4. If such memorandum announces conclusions of law controlling the decision, which the finding subsequently made does not present, resort may be had to it, under certain limitations, in aid of the appeal; but there is no occasion for this where no such variance appears. *Ib.*

Errors confined to those raised below.

5. An appellant's claims of error must be confined to those made in the court below and assigned in his reasons of appeal. *Gustafson* v. *Rustemeyer*, 125.

Conclusions reviewable and otherwise.

6. Inferences or conclusions of the trial court which result from sifting and weighing evidence and the credibility of witnesses, are matters of fact which this court cannot review; but the inference or conclusion drawn by the trial court from these specific, adjudicated facts, of legal liability, and of subordinate conditions essential to legal liability, are matters of law reviewable by this court upon appeal, where all the adjudicated facts appear of record. *Nolan, Admx.*, v. *N. Y., N. H. & H. R. Co.*, 159.

Inferences of law; inferences of fact.

7. In some instances it is impracticable for the trial court to set forth its inferences from testimony in a clear, detailed statement of adjudicated facts; and in such cases, although the inference of liability drawn by the trial court is one of law, yet it cannot be reviewed by this court, because the fact or facts upon which it rested cannot be transferred from the mind of the trier to the mind of the appellate court; and the inference is therefore, practically, a conclusion of fact. *Ib.*

Appeal must follow statute requirements.

8. The statutory requirements of an appeal to this court must be strictly complied with in order to properly perfect the appeal. *In re Application of the Shelton St. Ry. Co.*, 329.

Defective appeal, omission of time and place of court.

9. Under §§ 13 and 22 of Chap. 194 of the Public Acts of 1897, an appeal from a decision of a judge of the Superior Court to "the Supreme Court of Errors," without specifying therein the time or place of holding that court, is substantially defective and may be taken advantage of by plea in abatement. *Ib.*

Effect of general appearance.

10. A general appearance in this court is not of itself a waiver of the right to object to a defect in the process. *Ib.*

Papers to be filed with what clerk.

11. The clerk of the Supreme Court of Errors who makes up and has charge of the docket for the judicial district at any term, is the only

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APPEAL TO THE SUPREME COURT—*Continued.*

clerk with whom to file original papers presented during the term. But where such papers are required to be filed before the opening of the term to which the appeal is taken, they may be filed either with the clerk for the county in which the judgment appealed from was rendered, or with the clerk for the county in which the term is to be held. *Vincent* v. *McNamara*, 332.

Time to appeal; begins to run when.

12. The ten days within which an appellant must, under certain circumstances, appeal to the Supreme Court of Errors, begins to run from the time final judgment is entered up, and not from the date of the decision from which such judgment results. *Ib.*

Appeal seasonably taken.

13. A demurrer to the plaintiff's complaint was sustained on November 30th and an entry to that effect was made upon the record by order of the Superior Court. On December 31st the court, upon the plaintiff's motion, entered up judgment as of that date for the defendant, from which the plaintiff within ten days thereafter appealed. *Held* that the appeal was seasonably taken. *Ib.*

Appeal de costs.

14. An appeal to this court may be taken from the wrongful refusal of the trial court to award costs to the defendant upon the plaintiff's withdrawal of the action. The decision or determination of the trial court under such circumstances constitutes a final judgment, within the meaning of the statute relating to appeals to this court. *Wildman* v. *Munger et ux.*, 380.

Assignment of errors.

15. Errors not specifically assigned in accordance with the rule, will not be considered by this court upon appeal. *McKeon* v. *Byington*, 429.

Conclusions de facts, reviewable when.

16. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error. *Nichols* v. *Peck*, 439.

Jurisdiction outside of district.

17. Whether this court while sitting in one district can, on motion, pass an order regulating the disposition of an appeal pending in another, *quære*. *Scholfield Gear & Pulley Co.* v. *Scholfield*, 500.

Finding not reviewable if evidence is conflicting.

18. Exceptions to the action of the trial court in finding and refusing to find certain alleged facts from conflicting testimony, cannot avail the defeated party upon an appeal to this court. *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 516.

Qualification of expert witness.

19. The determination of the trial court as to the qualifications of an alleged expert will not be reviewed by this court upon appeal, unless it is clear from the record that such ruling was based upon incompetent or insufficient evidence. *Ib.*

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APPEAL TO THE SUPREME COURT—*Continued.*

Discretion de new trial.

20. It is within the discretion of this court to set aside a judgment founded upon inadmissible evidence, notwithstanding it appears from the record that a new trial cannot legally produce a different result. *Fuller et ux.* v. *Metropolitan Life Ins. Co.*, 647.

Prolix assignment of errors.

21. Great prolixity in the assignment of alleged errors in an appeal is unjustifiable. *Ib.*

See also ERROR, 1; FINDING OF COURT, 2–5; RECEIVER, 7; TAXATION, 2.

APPEARANCE. See APPEAL TO THE SUPREME COURT, 10.

APPLICATION OF PAYMENTS. See EVIDENCE, 13; STATUTE OF LIMITATIONS.

APPORTIONMENT. See MORTGAGE, 1–3.

APPROXIMATION, DOCTRINE OF. See WILLS CONSTRUED, 21.

ARCHITECT. See EVIDENCE, 19.

ASSETS. See EXECUTORS AND ADMINISTRATORS, 1, 2.

ASSIGNMENT OF ERROR. See APPEAL TO THE SUPREME COURT, 2, 5, 15, 21;

ASSUMPSIT. See VARIANCE.

ATTACHMENT. See DEEDS, 1; EXECUTION, 3; JUDGMENT, 6; RECEIVER, 12, 13; SALES, 5.

ATTEMPT TO COMMIT RAPE. See RAPE.

ATTORNEY AND CLIENT.

1. The knowledge of an attorney, gained in the very business in respect to which he is such attorney, is to be imputed to his client. *Sweeney* v. *Pratt et al.*, 274.
2. Counsel for the original receiver ought not to be permitted to act for his successor in office, in any inquiry in which the administration of the original receiver is attacked. *In re Premier Cycle Mfg. Co.*, 473.

See also EVIDENCE, 11.

AUDITORS, COMMITTEES AND REFEREES.

1. The Superior Court has jurisdiction to determine the correctness of the rulings made by its committee, when such rulings are fully set forth either in the report of the committee or in a remonstrance against the acceptance of such report. *McKeon* v. *Byington*, 429.
2. There is no occasion to recommit the report to the committee, if all the questions an aggrieved party desires to raise are sufficiently stated in his remonstrance. *Ib.*

See also VARIANCE.

BAILMENT. See CONTRACTS.

BANK BOOK. See GIFT, 1, 2.

BENEFITS AND DAMAGES. See ACTION, 1, 2.

BENEVOLENT ASSOCIATIONS. See VOLUNTARY ASSOCIATIONS, 1, 2.

BILL OF PARTICULARS. See PLEADING, 1, 2.

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BILLS AND NOTES.

1. A town is not estopped from setting up the illegality of an order drawn upon its town treasurer, merely because it has passed into the hands of a *bona fide* holder. Although such orders may be transferable by delivery or indorsement, they do not possess the full characteristics of commercial paper,—freedom from all legal and equitable defenses in the hands of a *bona fide* holder. *Goodwin* v. *East Hartford et al.*, 18.
2. It is within the power of a voluntary benevolent association to give a promissory note or bill of exchange for the purpose of compromising a suit pending against it. *Court Harmony* v. *Court Lincoln*, 634.

See also FRAUD, 4, 5; WAREHOUSE RECEIPT, 1–5.

BONDS.

1. Certain coupon bonds issued by the defendant company and owned by *H*, its president, while held by the plaintiff as collateral security for a debt due him from *H*, were conveyed by the latter to the plaintiff, by a written instrument, and thereby became the plaintiff's absolute property. In consideration of this conveyance the plaintiff, in the same instrument, agreed to sell and deliver the bonds to *H* upon payment of a specified amount within a limited time. Nothing was said by either party as to the coupons. In an action against the obligor, after the time allowed for *H* to repurchase the bonds had expired, to recover the amount of the unpaid coupons, it was *held* that upon these facts the trial court was fully justified in holding that the title to the coupons passed to the plaintiff with the bonds. *Fox* v. *Hartford & West Hartford Horse R. Co.*, 1.
2. That evidence of the price the plaintiff had obtained for certain shares of stock which also became his absolute property by virtue of the aforesaid conveyance, was irrelevant, and properly excluded; as was also evidence of the secret intent of *H* not to transfer the coupons with the bonds. *Ib.*
3. That a previous "arrangement" or understanding between the defendant and *H*, that he was not to present the coupons for payment until it was convenient for the company to pay them, was unavailing as a defense against coupons overdue at the date of their transfer to the plaintiff, inasmuch as it did not appear that such arrangement constituted a valid contract obligatory upon *H*, in whose shoes the plaintiff stood. *Ib.*
4. That interest upon the coupons from the time of their presentation for payment was properly allowed. *Ib.*
5. The case of *Rose* v. *Bridgeport*, 17 Conn. 243, limited and distinguished. *Ib.*
6. An obligee in a bond for a deed, who has paid no portion of the purchase price of the land, has no interest therein which can be levied upon under execution, nor any interest to which a judgment lien can attach. *Sweeney* v. *Pratt et al.*, 274.

See also INTOXICATING LIQUORS, 1–3; RECOGNIZANCE, 1, 2; REPLEVIN.

BOUNDARIES. See DEEDS, 2.

BUILDING CONTRACT. See EVIDENCE, 19.

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CANCELLATION OF INSTRUMENTS. See JUDGMENT, 8.
CAUSE OF ACTION. See ACTION, 4; JUDGMENT, 6, 8; JURISDICTION.
CHARGE OF COURT.
1. The trial court may properly refuse to charge the jury in respect to matters which are not pertinent to the case. *State* v. *Hanley*, 265.
2. To what extent the court should refer to or comment upon the evidence, in submitting to the jury a question of fact, is within the fair discretion of the trial judge. *McQuillan* v. *Willimantic Elec. Light Co.*, 715.
See also EMBEZZLEMENT, 2; LARCENY, 1, 2.
CHATTEL MORTGAGE. See SALES, 2, 3.
CHOSE IN ACTION. See EMBEZZLEMENT, 1, 2.
CLASS GIFT. See STATUTE OF PERPETUITIES, 2; WILLS CONSTRUED, 1, 7, 8, 15.
CLERK. See PRACTICE, 1.
CODICIL. See WILLS CONSTRUED.
COLLISION. See QUESTIONS OF LAW, 1–3.
COMITY. See WILLS CONSTRUED, 11–14.
COMMERCIAL PAPER. See BILLS AND NOTES, 1.
COMMISSIONERS ON ESTATES. See INSOLVENCY, 1, 2.
COMMITMENT. See INSANE PERSONS, 1.
COMMON COUNTS. See PLEADING, 1, 2.
COMMON LAW. See EXECUTORS AND ADMINISTRATORS, 1; RAPE, 1.
COMPENSATION. See HIGHWAYS, 6–9.
COMPROMISE OF SUIT. See VOLUNTARY ASSOCIATIONS, 2.
CONDEMNATION PROCEEDINGS. See HIGHWAYS, 9.
CONDITIONAL LIMITATION. See WILLS CONSTRUED, 22.
CONDITIONAL SALE. See SALES.
CONFLICT OF LAWS. See WILLS CONSTRUED, 11–14.
CONSIDERATION. See LIFE INSURANCE, 2; VOLUNTARY ASSOCIATIONS, 1, 2.
CONSTITUTIONAL LAW. See GAMBLING, 1; HIGHWAYS, 6–9; INSANE PERSONS, 1; TAXATION, 1–3; WILLS CONSTRUED, 11, 12.
CONSTRUCTION. See CONTRACTS; EVIDENCE, 22; HIGHWAYS, 9; LIFE INSURANCE, 6, 7; SALES, 1; STATUTES OF PERPETUITIES, 1–3; WAREHOUSE RECEIPT, 4, 5; WILLS CONSTRUED.
CONTRACTS.
The defendant guaranteed the due performance by *N* of the obligations assumed by him in a contract made with the plaintiff. After a lease to *N*, in the usual form, of premises owned by the plaintiff and consisting in part of a gristmill, the contract provided that the plaintiff should buy grain for *N* to grind and sell at the mill, for which *N* should pay the cost price at the railroad station in his town and one cent per bushel in addition; that payments should be made to the plaintiff once each month for the grain sold by *N* during the month immediately preceding; and that *N* should be responsible for all grain sold, should collect all bills therefor, and should sell to whom he saw fit. *Held* that upon a proper construction of this contract *N* was a bailee and liable as a purchaser, not

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CONTRACTS—*Continued.*

for all grain delivered to him by the plaintiff, but only for such part thereof as he himself had sold or disposed of; and therefore the defendant, *N*'s guarantor, could not be held liable upon a complaint which charged the transaction as an ordinary sale, and entirely failed to aver any default or nonpayment by *N* for grain sold by him. *Johnson* v. *Allen*, 738.

See also AGENCY, 4; EVIDENCE, 19, 22; FIRE INSURANCE, 1, 2; LIFE INSURANCE, 1, 2; QUANTUM MERUIT, 1, 2; SALES, 1, 3, 4.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CORPORATIONS. See HIGHWAYS, 8; TAXATION, 1–9; TRADE-MARK, 5; VOLUNTARY ASSOCIATIONS, 1, 2.

COSTS.

Section 990 of the General Statutes allowing a defendant who has entered his appearance, to take judgment for costs upon the withdrawal of the action after it has been returned to court and entered upon the docket, applies to cases withdrawn before, as well as to those withdrawn after, the return day. *Wildman* v. *Munger et ux.*, 380.

See also APPEAL TO THE SUPREME COURT, 14; RECOGNIZANCE, 1, 2; TRESPASS; NOTE, p. 70.

COVENANT TO STAND SEIZED TO USES. See STATUTE OF PERPETUITIES, 3.

COUNTY. See HIGHWAYS, 5.

COUPONS. See BONDS, 1, 3, 4.

COURT OF PROBATE.

Although the Court of Probate has no power to determine directly and conclusively the construction to be given to a will, yet where an application for the appointment of an administrator *de bonis non* is based upon the claim that a clause of the will is void and the property therein attempted to be disposed of is intestate estate, such court may construe the will for the purpose of determining whether this claim is reasonable and made in good faith, or is without any foundation in law or fact, in order to determine whether such appointment should or should not be made. *Chamberlin, Exr., Appeal from Probate*, 363.

CRIMINAL LAW. See EVIDENCE, 16–18; GAMBLING, 1–3; INTOXICATING LIQUORS, 1–3; LARCENY, 1, 2; RAPE.

CRUELTY. See DIVORCE, 2.

DAMAGES.

1. Upon a hearing in damages after a default, the plaintiff, having shown the extent of the injury, is entitled to substantial damages, unless the defendant proves either his own freedom from negligence or contributory negligence of the plaintiff. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.
2. In an action to recover damages for fraud in the sale or exchange of property, real or personal, the measure of damages is the difference between the actual value of the property at the time of the sale

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DAMAGES—*Continued.*
or exchange, and what it would have been worth if it had been as represented. *Gustafson* v. *Rustemeyer*, 125.
3. In an action against an officer for a negligent escape and for a failure to return the process to court, the plaintiff is entitled to recover the actual damage he has sustained by reason of the officer's default. *Swan et al.* v. *Bridgeport* 143.
4. Ordinarily the amount of this damage is *prima facie* established by proof of the judgment in the former action and of the plaintiff's inability to collect it by legal process. But where the officer's failure to return the writ and complaint makes such evidence impossible, the plaintiff may prove what judgment he might or could have obtained in the former action, had the process therein been returned to court. *Ib.*
5. In an action to recover for the destruction of property, without malice, the measure of damages is the market value of the property destroyed at the date of its destruction. No deduction from this value can be allowed the defendant upon the ground that if he had not destroyed the property the plaintiff would have subsequently lost a portion of it by other causes. *Hubbard* v. *N. Y., N. H. & H. R. Co.*, 563.
See also ACTION, 1, 2; ERROR, 2; FRAUD, 5; JUDGMENT, 6, 7; REPLEVIN.
DATE. See ABATEMENT, PLEA IN; EXECUTION, 3.
DEBTOR AND CREDITOR. See EXECUTION, 2; INSOLVENCY, 1, 2; RECEIVER, 9, 10; SALES, 1, 3, 4.
DEEDS.
1. An obligee in a bond for a deed, who has paid no portion of the purchase price of the land, has no interest therein which can be levied upon under execution, nor any interest to which a judgment lien can attach. *Sweeney* v. *Pratt et al.*, 274.
2. The monuments which control the courses and distances stated in a deed, are confined to those to which the conveyance itself refers. *Kashman* v. *Parsons*, 295.
See also JUDGMENT, 8; STATUTE OF PERPETUITIES, 1–3.
DEFAULT. See HEARING IN DAMAGES; QUANTUM MERUIT, 1.
DEFINITIONS. See WORDS AND PHRASES.
DELIVERY. See GIFT, 1.
DEMURRER. See FINDING OF COURT, 1; GRADE CROSSINGS, 2, 4; PLEADING, 4, 7, 8.
DEVIATION. See WAYS, 1, 2.
DEVISE AND LEGACY. See WILLS CONSTRUED.
DISCRETION. See AMENDMENT, 2; APPEAL TO THE SUPREME COURT, 20; CHARGE OF COURT, 2; DIVORCE, 3; EVIDENCE, 12; RECEIVER, 8.
DIVIDEND. See LIFE INSURANCE, 6–9.
DIVORCE.
1. The mere fact that the parties to a divorce suit had spent their winters in New York, is not inconsistent with a finding that the plaintiff had "continuously resided in this State three years next

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DIVORCE—*Continued.*
before the date of the complaint," as required by § 2806 of the General Statutes. *Morehouse* v. *Morehouse*, 420.
2. The defendant, knowing that his wife had a heart trouble which his conduct would aggravate, frequently appeared before her in an intoxicated condition, humiliated her by his vulgarity and profanity, and abused her with vile and unfounded charges. Aware that he had an infectious disease, he nevertheless solicited and had intercourse with his wife, who was ignorant of his condition, and thereby communicated to her the disease from which she suffered for months. Afterwards, while still having the disease, he again solicited intercourse with her which she refused, whereupon he attempted to accomplish his purpose by violence. As a result of his ill-treatment his wife became seriously and dangerously ill. *Held* that this conduct of the husband constituted intolerable cruelty and justified the trial court in granting her a divorce. *Ib.*
3. Upon his cross-examination the defendant denied that he had acknowledged his ill-treatment of his wife to one *C*, and thereupon *C* was called in rebuttal to testify to the defendant's admissions. *Held* that the allowance of this evidence in rebuttal rather than in chief, rested in the discretion of the trial court, and that such discretion had not been abused. *Ib.*
4. The answer of the defendant alleged that the plaintiff had herself been guilty of adultery, and although this allegation was not formally denied upon the record, the parties proceeded with the trial as though it had been denied, and introduced evidence to prove and disprove the truth of the charge. *Held* that the defendant was estopped from claiming that the judgment in favor of the plaintiff was erroneous on account of this formal defect. *Ib.*

DOMICIL. See WILLS CONSTRUED, 11, 14.

DOWER. See WILLS CONSTRUED, 23.

DURESS. See FINDING OF COURT, 1.

EJECTMENT. See JUDGMENT, 2.

ELECTRIC RAILWAYS. See HIGHWAYS, 6–9.

EMBEZZLEMENT.
1. The charge of embezzling "moneys" under § 1580 of the General Statutes, cannot be supported by proof of embezzling a chose in action. *State* v. *Hanley*, 265.
2. The defendant was charged with receiving, as agent, $63 in money and embezzling the same. The proof showed that he received an order for the payment of $230, agreeing to collect the same, to retain $167 of the proceeds in discharge of a debt due himself, and appropriate the balance as his principal directed, and that before the order was payable he indorsed it over to another in payment of his own debt. *Held* that a charge to the jury that such indorsement was an appropriation of the money of his principal, as charged in the complaint, was erroneous. *Ib.*
3. The drawer of the order testified that the defendant agreed to pay a part of the proceeds when collected, to one *S*, to whom the

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EMBEZZLEMENT—*Continued.*
drawer was indebted. *Held* that *S* might testify, in corroboration of this evidence, that the defendant had afterwards said to him that he, the defendant, would pay his (*S's*) claim. *Ib.*
EMINENT DOMAIN. See ACTION, 1; HIGHWAYS, 6–9; WHARF, 3–5.
EQUITABLE CONVERSION.
Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it. *Clarke's Appeal from Probate*, 195.
See also WILLS CONSTRUED, 11, 13.
ERASING FROM DOCKET.
1. A cause is not to be erased from the docket unless the want of jurisdiction plainly appears on the face of the record. *Wheeler et al.* v. *New York, N. H. & H. R. Co.*, 326.
2. The General Statutes permit an appeal from the decision of the board of railroad commissioners in the matter of the removal of a grade crossing, while a Special Act for the abolition of grade crossings in Bridgeport provides that the decision of the board of railroad commissioners shall be final and conclusive. *Held* that inasmuch as it did not appear from the record that the proceedings instituted by the railroad company were brought under the Special Act, the Superior Court erred in erasing the appeal from its docket. *Ib.*
See also APPEAL FROM PROBATE, 1, 2.
ERROR.
1. The plaintiff, who sued as administrator to recover damages for personal injuries resulting in the death of his intestate, assigned as error several rulings of the trial court in respect to evidence. *Held* that these rulings, even if erroneous, were harmless, inasmuch as it clearly appeared from the record that the plaintiff's right of recovery was defeated by the contributory negligence of his intestate,—a conclusion which the rulings complained of in nowise affected. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.
2. Parties are entitled to know which of two conflicting rules for measuring damages was adopted and applied by the trial court. But if the application of either rule would have led to substantially the same result, the error must be considered as harmless and not ground for a new trial. *Gustafson* v. *Rustemeyer*, 125.
See also APPEAL TO THE SUPREME COURT, 1, 2, 5, 15; PRACTICE, 2; TRADE-MARK, 5.
ESCAPE. See DAMAGES, 3, 4.
ESTATE OF DECEASED PERSONS. See EXECUTORS AND ADMINISTRATORS, 1, 2.
ESTOPPEL.
An estoppel by conduct always presupposes error on the one side and fault or fraud on the other. *Sweeney* v. *Pratt et al.*, 274.
See also DIVORCE, 4; GIFT, 2; JUDGMENT, 1; MUNICIPAL CORPORATIONS, 2; REPLEVIN; SALES, 3; WAREHOUSE RECEIPT, 5; WAYS, 4.

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EVIDENCE.

Discrediting witness; ratification of horse trade.

1. In an action of replevin tried upon the general issue, the plaintiff sought to recover the possession of a horse which he claimed belonged to him and had been traded off without his permission by his father-in-law, *S*, to the defendant. *Held* that evidence that *S* had, upon the plaintiff's suggestion, procured a writ and complaint against the defendant for fraud in making the trade, in which *S* was described as plaintiff and owner of the horse, and which had been read to the defendant by the officer, was admissible, either for the purpose of discrediting the plaintiff's claim of title, or, in connection with other evidence, to show a ratification by the plaintiff of the trade made by *S* with the defendant. *Curnane* v. *Scheidel*, 13.

Ruling justified by the facts.

2. The trial court ruled that upon the facts found the plaintiff ratified or affirmed the acts of *S* in trading horses. *Held* that this ruling was fully justified by the facts disclosed upon the record. *Ib.*

Value; variance.

3. In an action upon the common count for work and labor, the plaintiff's bill of particulars alleged that the work was done at an agreed price, the amount of which was stated. *Held* that the plaintiff might prove and recover the reasonable value of his work and labor, notwithstanding such allegation of a specific contract price. *Brewster* v. *Aldrich et al.*, 51.

Nonsuit ought not to be granted, when.

4. A nonsuit ought not to be granted in cases tried either to the court or to the jury, if substantial evidence is produced by the plaintiff in support of his cause. *Foskett & Bishop Co.* v. *Swayne et al.*, 74.

Mechanic's lien; conduct of wife; nonsuit.

5. In an action against husband and wife to foreclose a mechanic's lien, the plaintiff offered evidence that the wife owned the house upon which the improvements were made, that she took part in selecting the materials, gave directions concerning the work, in some instances countermanded the orders of her husband, and at times evinced an expectation to pay for the labor and materials. *Held* that upon this evidence judgment might reasonably have been rendered against the wife, and that such evidence, at all events, should have protected the plaintiff from a nonsuit. *Ib.*

Irrelevant statements by officer of bank.

6. Statements claimed to have been made by a bank president concerning the dealings between a firm, in which he was a partner, and an insolvent debtor, are irrelevant upon an inquiry as to the relation which the bank sustained to such insolvent and to his property. *State Bank* v. *Waterhouse, Jr.*, 76.

Authority to demand property.

7. A letter of the plaintiff directing a certain person to make demand upon the defendant for property about to be replevied, is admissible upon the part of the plaintiff to show the agent's authority. *Ib.*

Sale of land; false statements.

8. False and fraudulent oral representations by a vendor of land, as to

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EVIDENCE—*Continued.*

its boundaries and dimensions, are admissible to show the fraud which induced the buyer to accept a deed of the property, notwithstanding the asserted acreage is therein described as "more or less." *Gustafson* v. *Rustemeyer*, 125.

Pleading; agency.

9. If the plaintiff intends to prove that the acts charged against the defendant were committed by his agent, the complaint should aver the agency, otherwise the evidence will be excluded on objection. *Porter* v. *Ritch et al.*, 235.

Sanity; hearsay.

10. A statement by a witness that the members of a literary club considered a paper read by the plaintiff as one of the strongest they had had, is hearsay and irrelevant upon the question of the plaintiff's sanity. *Ib.*

Malice; advice of counsel.

11. Where the defendant's action is claimed to have been malicious, he may show that he acted upon the advice of counsel in all that he did. *Ib.*

Hypothetical question; discretion.

12. It is within the discretion of the trial court to exclude a hypothetical question, until a foundation for it has been laid by the evidence. *Ib.*

Application of payment; letter.

13. The parties were at issue as to whether a payment made by the debtor to his creditor was intended to apply to and include a particular note. *Held* that a letter written by the creditor to the debtor, at the time of such payment, showing how the money had been applied, was, in connection with the debtor's failure to object to such application, admissible in support of the contention of the creditor. *Sweeney* v. *Pratt et al.*, 274.

Construction of will.

14. Extrinsic evidence is inadmissible in the construction or interpretation of a will, where the language of a testator is free from ambiguity. *Post, Exr.*, v. *Jackson et al.*, 283.

Issue de former finding; copy admissible.

15. Where the issue raised by the pleadings is as to whether a certain request for a finding of facts in a former action between the same parties, was filed, the party holding the affirmative of this issue has the right to introduce a copy of such request, irrespective of the question whether the proceedings in which it was filed did or did not result in a judgment conclusive of the present controversy. *Kashman* v. *Parsons*, 295.

Larceny; threats to burn house.

16. In a prosecution for theft, evidence that the accused threatened to burn *M's* dwelling-house with its inmates, unless *M* would comply with his demand for money, is relevant and admissible as tending to prove that *M* parted with his money because of a reasonable

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EVIDENCE—*Continued.*

fear of immediate bodily injury to himself and family. *State* v. *Kallaher*, 398.

Question of fear for jury.

17. Whether the person who thus parts with his property was in actual fear, and if so, whether that fear was reasonable, are questions of fact to be determined in each particular case by the language of the threat, the conduct of the accused, and the circumstances surrounding the property owner. *Ib.*

Threats to attach.

18. In the present case the accused, during the same conversation and as part of it, threatened that he would bring a civil suit against *M* and attach all his property. *Held* that evidence of this threat was admissible in connection with and as introductory to the more serious threat, although not a ground for a charge of larceny. *Ib.*

Parol to vary writing; builder's contract.

19. A builder who contracts in writing to erect a building in accordance with the architect's plans and specifications, is not liable for defects in the building which are due to structural faults in the architect's plans, unless made so by the terms of the written agreement; and in the absence of fraud or mistake, evidence that he orally guaranteed the correctness of the plans and the strength and stability of the building, is inadmissible to vary or enlarge his written obligations. *Hills et al., Exrs.*, v. *Farmington*, 450.

Identity of goods; schedules.

20. As tending to prove that certain goods attached and replevied were the same goods bought by the plaintiff in replevin from a trustee in insolvency, the defendant offered in evidence a certified copy of the inventory of the insolvent estate and one of the several schedules referred to therein. *Held* that the evidence was properly admitted. *Fielding* v. *Silverstein*, 605.

Declarations; res gestæ.

21. In an action to recover damages for personal injuries caused by the bite of a dog, evidence of the declaration of the plaintiff that she had been bitten by the defendant's dog, made to her mother within five minutes of the injury, is but a narrative of a past event and inadmissible as part of the *res gestæ*. *McCarrick* v. *Kealy*, 642.

Province of experts; writings.

22. While experts may be called to define terms of art and, when necessary, to explain the principles of their science, they cannot be permitted to instruct the court as to the meaning and legal interpretation of a written instrument, or to give their opinion thereon. *Fuller et ux.* v. *Metropolitan Life Ins. Co.*, 647.

Negligence; defendant insured against loss.

23. In an action against a corporation by an employee to recover damages for personal injuries alleged to have been caused by its negligence, the defendant offered to show that it was protected by insurance against loss from the plaintiff's claim. *Held* that inasmuch as it did not appear that the witness knew that such insur-

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EVIDENCE—*Continued.*

ance had been effected, the fact of its existence could have had no influence upon his mind, and the evidence was therefore properly rejected. *McQuillan* v. *Willimantic Elec. Light Co.*, 715.

24. Whether under other circumstances such evidence would have been admissible, *quære*. *Ib.*

See also APPEAL TO THE SUPREME COURT, 6, 19, 20; ATTORNEY AND CLIENT, 1; BONDS, 2, 3; CHARGE OF COURT, 2; DAMAGES, 4; DIVORCE, 3; EMBEZZLEMENT, 1, 3; ERROR, 1; GAMBLING, 2; HEARING IN DAMAGES; HIGHWAYS, 2; JUDGMENT, 2–4; NEGLIGENCE, 5, 6; NONSUIT, 1–3; PARTNERSHIP, 1; PLEADING, 11; RECEIVER, 9; REPLEVIN; TRADE-MARK, 1–4; VARIANCE; VERDICT AGAINST EVIDENCE, 1, 2; WAYS, 2, 4.

EXCEPTIONS. See APPEAL TO THE SUPREME COURT, 18.

EXECUTION.

1. Proceedings for taking land upon execution are *stricti juris*, and no title passes unless the statute is exactly pursued. *Schroeder* v. *Tomlinson*, 348.

2. The title of an execution creditor in the land of his debtor is not perfected, as against third persons, until the execution proceedings have been returned and recorded in the land records, as required by General Statutes, § 1184. And although the creditor's title, when duly perfected, ordinarily relates back to the first step in the process, this legal fiction will not be permitted to work injustice to a *bona fide* purchaser of land whose deed is recorded during the pendency of the execution proceedings. *Ib.*

3. The levy of an execution upon land, in respect to the rights acquired by the creditor, does not speak from its date in the same manner as a levy of attachment. *Ib.*

See also DEEDS, 1.

EXECUTORS AND ADMINISTRATORS.

1. At common law, as a general rule, the goods, chattels and credits of a deceased person were regarded as fully administered, so far as an administrator *de bonis non* was concerned, when they had been changed, altered, converted, or otherwise disposed of by the executor or administrator. This rule has been modified to some extent by statute in this State, and under our law administration is not necessarily regarded as complete until the assets of the estate have been turned over to those who are rightfully entitled to them. *Chamberlin, Exr., Appeal from Probate*, 363.

2. Accordingly, if it appears that property which has been disposed of as testate estate is really intestate, it becomes the duty of the executor or administrator if living and capable, otherwise of an administrator *de bonis non* to be appointed for that purpose, to recover, hold and administer such estate in the orderly and prescribed way. *Ib.*

See also GIFT, 2; PERSONAL REPRESENTATIVES; TRUST AND TRUSTEE, 1.

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EXPERT TESTIMONY. See APPEAL TO THE SUPREME COURT, 19; EVIDENCE, 22.

FELLOW-SERVANTS. See MASTER AND SERVANT, 3.

FICTIONS. See EXECUTION, 2.

FINDING OF COURT.

1. The trial court found that a certain written agreement set forth at length by the defendants in their answer as a release and discharge of the cause of action alleged by the plaintiff, was intended by all the parties to accomplish and did effect a full and final settlement of all claims, questions and differences between them, as averred by the defendants; and that said agreement was not executed by the plaintiff under duress, as averred by him in his reply, but voluntarily and under the advice of his friends and counsel. *Held* that this finding constituted an absolute bar to the plaintiff's entire action; and that if the plaintiff had desired to raise the claim that the written agreement did not by its terms operate to bar his action, and that the intent of the parties that it should have that effect was unavailing because not so expressed in it, he should have demurred. *Porter* v. *Ritch et al.*, 235.
2. A special finding in an equitable action, made for the purpose of taking an appeal, has no conclusive effect upon the parties in a collateral suit, except to explain the scope of the judgment, where that is doubtful upon its face. *Kashman* v. *Parsons*, 295.
3. Under General Statutes, § 1111, and rule 17, § 5, General Rules of Practice (58 Conn. 585), the trial court in every civil action must cause the facts on which its final judgment is based, to appear of record, without regard to whether it is or is not to be made the subject of appellate proceedings. *Scholfield Gear & Pulley Co.* v. *Scholfield*, 500.
4. While under Chap. 194, § 7, of the Public Acts of 1897, p. 889, the trial judge cannot be compelled to make a finding for purposes of an appeal, unless the draft submitted to him states the questions of law which it is desired to have reviewed, he nevertheless may make such a finding upon his own motion, and without any request; and it is entirely proper to do so where a request is presented which by a merely formal error is deprived of its mandatory effect. *Ib.*
5. Should the appellee, however, be prejudiced by the omission of the appellant to specify in the proposed finding the grievances which he desired to have reviewed, and his objections to such draft be overruled by the trial judge, this court, upon seasonable application, will grant him suitable relief. *Ib.*

See also APPEAL TO THE SUPREME COURT, 3, 4, 18; DIVORCE, 1; PLEADING, 3; RECEIVER, 7.

FIRE INSURANCE.

1. An applicant for fire insurance in the *A* company, having received no response to his application, ten days thereafter took out a policy in the defendant company. This policy provided that if the insured

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FIRE INSURANCE—*Continued.*
then had, or should thereafter procure, other insurance upon the property, the entire policy should be void. Subsequently the policy of the *A* company, delayed in transmission, was received and retained by the insured. *Held* that the acceptance of this policy was a violation of the provision against other insurance contained in the policy issued by the defendant, and precluded the plaintiffs from a recovery. *Cutler et al.* v. *Royal Insurance Co.*, 566.

2. Another clause in the policy issued by the defendant required the assured to maintain an insurance upon the property described of at least 80 per cent of its cash value, or, failing so to do, to bear his share of any loss. *Held* that whatever might be the effect of this clause in certain cases, it could not operate as an implied permission to procure other insurance, or as a waiver of the prohibition against such insurance, where, as in the present instance, the amount already covered by the policy in suit equalled or exceeded 80 per cent of the value of the property at the time it was insured and at the date of its loss. *Ib.*

FOREIGN ATTACHMENT. See RECEIVER, 12.

FOREIGN LAWS. See WILLS CONSTRUED, 11–14.

FORFEITURE. See INTOXICATING LIQUORS, 1–3; SUMMARY PROCESS, 2.

FORMER ADJUDICATION. See JUDGMENT; REPLEVIN.

FRANCHISE. See TAXATION, 4.

FRATERNAL ASSOCIATIONS. See LIFE INSURANCE, 1–5; VOLUNTARY ASSOCIATIONS, 1, 2.

FRAUD.

1. A mere naked, false representation as to the value of real estate, made by the vendor to his vendee, is not actionable unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was induced to forbear inquiry must be specifically pleaded. *Gustafson* v. *Rustemeyer*, 125.

2. In an action to recover damages for fraud in the sale or exchange of property, real or personal, the measure of damages is the difference between the actual value of the property at the time of the sale or exchange, and what it would have been worth if it had been as represented. *Ib.*

3. False and fraudulent oral representations by a vendor of land, as to its boundaries and dimensions, are admissible to show the fraud which induced the buyer to accept a deed of the property, notwithstanding the asserted acreage is therein described as "more or less." *Ib.*

4. A complaint alleged that the defendant obtained a loan from the plaintiff by means of a forged and counterfeited promissory note. The evidence showed that the plaintiff was induced, by means of the forged note, to surrender to the defendant a valid claim against him, evidenced by a note upon which he was indorser. *Held* that the gist of the action was the fraud of the defendant, and that the allegation of a loan was merely matter of inducement. *Held* also,

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FRAUD—*Continued.*

that if such allegation could be regarded as a material one, the facts proved showed no fatal variance, inasmuch as it appeared that the parties had treated the notes as money or as a loan. *Swan et al.* v. *Bridgeport*, 143.

5. The trial court found that the plaintiff's damage was the amount due him upon the forged note, and rendered judgment for that sum. It did not appear that a judgment against the defendant in the former action would have been valueless, nor did the finding disclose any facts which would necessarily have reduced the plaintiff's loss below the amount due upon the forged note. *Held* no error. *Ib.*

See also ESTOPPEL.

GAMBLING.

1. Chapter 68 of the Public Acts of 1893, which prohibits all persons from engaging in the business of transmitting money to any race track or other place to be there bet upon any horse-race, game, sport, etc., whether within or without this State, and also the keeping of any place in which such business is permitted or carried on, is not in violation of the Federal Constitution as a regulation of interstate commerce. *State* v. *Harbourne*, 484.
2. Although a single transfer of money by a telegraph company for betting purposes, does not constitute a carrying on of the prohibited business, yet such act would be relevant and, in connection with other evidence, might be sufficient to prove a violation of the statute. *Ib.*
3. It is not essential to a violation of the statute by a telegraph company, that its business should relate exclusively to the transmission of money for betting purposes; it is enough if it engages in that business, although its other business may be legitimate telegraphing. *Ib.*

See also LIFE INSURANCE, 8.

GENERAL RULES OF PRACTICE.

Rule XVI, 58 Conn. 584. Assignment of error, 102, 433.
" XVII, § 5, 58 Conn. 585. General finding, when sufficient, 503.
" XVIII, §§ 3–5, 58 Conn. 586, 587. Form and entry of judgment, 340.

GIFT.

1. The delivery of a bank book by the owner to the donee, with the intent that the latter should take the title to the money represented therein, is a sufficient delivery to constitute a valid gift of the money. *Guinan's Appeal from Probate*, 342.
2. The appellee claimed title to a savings bank deposit of which she had obtained possession as a gift. She had been appointed administratrix on the estate of the donor and had receipted for the deposit in her name as administratrix. *Held*, notwithstanding this fact, that she was not estopped to show that her appointment as administratrix was applied for and granted to enable her the more readily to appropriate the bank deposit to her own personal use. *Ib.*

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GRADE CROSSINGS.

1. The board of railroad commissioners has the power, in adopting a plan for the removal of a grade crossing on one street, to locate a wing wall or supporting abutment embodied in the plan, in an adjoining highway; and the question of the necessity of such location for the purpose intended, can be raised only by an appeal from the commissioners' order. *Bristol* v. *New England R. Co.*, 305.
2. In the case at bar the plaintiff sought to restrain the defendant from placing a wing wall or supporting abutment upon North Main street. The defendant, in justification, set forth at length the order of the railroad commissioners directing the removal of a grade crossing on Main street, and alleged that it intended to build the structure complained of in exact accordance with this order. To this defense the plaintiff demurred, upon the ground that the order did not authorize nor justify the encroachment on North Main street. *Held* that the site of the proposed abutment was sufficiently designated in the order and map of the railroad commissioners, and therefore the question whether any portion of the land within the true limits of North Main street was to be covered by this authorized structure, was immaterial. *Ib.*
3. That the order indicated that the commissioners had fixed the location in question with the full understanding that it might be, and probably was, within the limits of the highway. *Ib.*
4. That the order being sufficient on its face, the question of a possible latent defect therein could not be raised upon demurrer; nor was it open to the plaintiff to attack the order as having been unadvisedly made, or as made under a misapprehension of essential conditions. *Ib.*
5. Section 3481 of the General Statutes, passed in 1883, forbids the construction of highway crossings at grade over the tracks of a railroad. *Held* that this prohibition applied to all highway grade crossings not fully completed at the passage of the Act, without regard to whether such highways were laid out before or after that time. *New York, N. H. & H. R. Co. et al.* v. *New Haven*, 390.
6. A city has no right to enter upon the layout of a railroad and construct or repair a highway grade crossing by laying planks and timbers between the rails. This work is required by statute (§ 3499) to be done by the railroad company, and in case of its wrongful neglect or refusal performance may be enforced by the railroad commissioners. *Ib.*
7. Section 31 of the defendant's charter gave to its common council sole and exclusive authority and control over all streets and highways within the city limits, and sole and exclusive power to lay out, make and repair such highways. *Held* that this provision must be construed with reference to the general statutes giving to the railroad commissioners the control of highway grade crossings, and, in case of conflict, must yield to the paramount authority of the general law. *Ib.*

See also HIGHWAYS, 7.

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GUARANTY. See CONTRACTS; EVIDENCE, 19.

HARBOR. See WHARF, 1–5.

HEARING IN DAMAGES.

Upon a hearing in damages after a default, the plaintiff, having shown the extent of the injury, is entitled to substantial damages, unless the defendant proves either his own freedom from negligence or contributory negligence of the plaintiff. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.

See also PLEADING, 11.

HEIRS. See WILLS CONSTRUED, 1–3, 6, 7.

HIGHWAYS.

1. By Chap. 126 of the Public Acts of 1887, p. 746, the first selectmen of the five towns which were found to be specially benefited by the layout and establishment of a public highway across the Connecticut River at Hartford, and which were thereafter chargeable with its support, were constituted a board "for the care, maintainance and control of said highway," and for that purpose became "a body politic and corporate." *Held* that the expenses which this board could lawfully incur and impose upon the several towns were limited to those for the repair and maintenance of the highway; and that the towns were not liable for expenses incurred by the board for securing legislation whereby its own corporate existence was terminated and the burden of maintaining the highway was transferred to the State. *Goodwin* v. *East Hartford et al.*, 18.
2. In a proceeding under § 2674 of the General Statutes, to compel a town to repair certain of its public roads, the question whether such roads are highways or not is one that may be raised by the town and, if raised, must be determined by the trier as incidental to the decision of the main question. *Anderson et al.* v. *New Canaan*, 99.
3. Notice to a policeman of a dangerous excavation in a sidewalk may be notice to the city, provided the ordinances and department rules make it the duty of such officer to inspect the condition of the streets, and in case of necessity to erect suitable barriers or safeguards for the protection of the public from injury; although the street department is the immediate representative of the city in respect to the maintainance and repair of its highways. *Cummings* v. *Hartford*, 115.
4. The case of *Boucher* v. *New Haven*, 40 Conn. 456, explained and distinguished. *Ib.*
5. A county cannot escape its liability to a town for one third of the expense incurred by the latter for the permanent improvement of its highways, under Chap. 315 of the Public Acts of 1895, merely because it has no money in the treasury wherewith to pay the obligation. It is the duty of the county authorities to provide funds to meet its statutory liabilities. *New Milford* v. *Litchfield County*, 435.
6. Special damage to the land of an adjoining proprietor, caused by the location and operation of a railroad in the highway, constitutes an appropriation of his property for which compensation must be

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HIGHWAYS—*Continued.*

paid, notwithstanding the location of railroads of a certain character, found by the legislature to promote the ordinary use of a highway, may not be a taking of the land within the highway requiring compensation. *N. Y., N. H. & H. R. Co.* v. *Fair Haven & Westville R. Co.*, 610.

7. The General Assembly may authorize an electric railway to cross the tracks of a steam railroad at grade in a public highway, without providing for the payment of compensation to the latter for any inconvenience or damage resulting to it therefrom. The grant of such a privilege by the State confers no property right in the soil of the highway upon either railway company. *Ib.*

8. There is a material distinction between the power of the State to authorize the location and operation of an electric railway upon a turnpike or bridge causeway, and its power to authorize such location and operation upon a statutory, public highway. In the latter case the possessory right, disturbed by the railway, belongs to the State and may be relinquished without compensation; while in the former instance this possessory right constitutes the property of a private corporation and cannot be taken without making just compensation therefor. *Ib.*

9. The plaintiff, a steam railroad company, had, by condemnation and by deed, acquired the title to a certain parcel of land formerly owned by a toll-bridge company and across which its bridge causeway extended, subject to such legal rights of crossing as then existed. *Held* that the right to cross this strip with an electric railway, subsequently conferred upon the defendant by the legislature, was not excepted by the condemnation proceedings instituted by the plaintiff, and that the operation of an electric railway across this parcel and across the plaintiff's tracks at grade, ought to be enjoined until the defendant had compensated the plaintiff for the injury thereby caused to its property rights. *Held*, also, that the defendant's charter, neither in its original form nor as amended, contemplated the defendant's use of this property without making compensation therefor. *Ib.*

See also ACTION, 1, 2; GRADE CROSSINGS, 1–7; NEGLIGENCE, 6; QUANTUM MERUIT, 2; STREET RAILWAYS, 1; WAYS, 1–4.

HORSE RACING. See GAMBLING, 1.

HUSBAND AND WIFE. See NONSUIT, 2.

HYPOTHETICAL QUESTIONS. See EVIDENCE, 12.

IMPLIED AGREEMENT. See LIFE INSURANCE, 1, 2; MASTER AND SERVANT, 4, 5; QUANTUM MERUIT, 1, 2; TAXATION, 6.

INDICTMENT, INFORMATION AND COMPLAINT. See EMBEZZLEMENT, 1, 2; RAPE, 1, 3.

INDORSEMENT. See BILLS AND NOTES.

INFANT.

It is not necessary to the institution or prosecution of a suit by *prochein ami*, that the infant should have authorized or consented to the action. *McCarrick* v. *Kealy*, 642.

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INFERENCE. See APPEAL TO THE SUPREME COURT, 6; QUESTIONS OF LAW, 1–3.

INJUNCTION.

1. If the laches of a party make it difficult or impossible for the court to enjoin his adversary without inflicting great injury thereby, an injunction should be refused and the party be left to his remedy at law. *Fisk* v. *Hartford*, 720.
2. A riparian mill owner who has for many years knowingly permitted a city to take its water supply in gradually increasing quantities from the head-waters of the stream, by means of expensive reservoirs and distributing mains, is not entitled to an injunction to restrain such diversion. Nor will the delay of the mill owner in asserting his rights be excused or justified, merely because the city had until recently found it economical and convenient to return the greater part of the water thus taken, in the form of sewage, to the stream above his dam. *Ib.*

See also TRADE-MARK, 5.

INSANE PERSONS.

1. Chapter 162 of the Public Acts of 1889 relating to the commitment of insane persons, provided (§ 6) that "pending proceedings" for the hearing and examination, the judge of probate might make and enforce such reasonable orders for the care and custody of the person alleged to be insane, as he should deem suitable and proper. *Held* that this provision for the temporary detention and restraint of the individual alleged to be insane, was not an infringement of the constitutional right of personal liberty, but a justifiable regulation of that right in the interest of society. *Porter* v. *Ritch et al.*, 235.
2. That the "proceeding" mentioned in the statute was not an ordinary "action" at law, which would be pending only from the service of process upon the adverse party, but an inquest of insanity, a police regulation; and therefore was "pending" as soon as the complaint had been referred to the judge. *Ib.*
3. That an order for the temporary detention of the person alleged to be insane, pending a hearing upon the complaint, was merely a part of the procedure and not an adjudication which entered into the judgment or decree. *Ib.*

See also EVIDENCE, 10.

INSOLVENCY.

1. It is no part of the duty of a trustee in insolvency to appeal from the refusal of the Court of Probate to grant his application for an extension of the time within which alleged creditors of the insolvent might present their claims to commissioners; nor has the trustee such an interest, personal or representative, as entitles him, under the statute, to take such an appeal. *Woodbury, Trustee, Appeal from Probate*, 455.
2. Such an appeal, if taken by the trustee, will be erased from the docket of the Superior Court upon motion of the appellee. *Ib.*
3. The rule applicable to secured creditors in the distribution of the property of an insolvent debtor whose estate is in settlement in the

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INSOLVENCY—*Continued.*

Court of Probate (General Statutes, § 590), applies also to secured creditors of an insolvent corporation in the hands of a receiver. *In re Greeley & Co.*, 494.

See also PERSONAL REPRESENTATIVES; RECEIVER, 10, 12; SALES, 1–4.

INSURANCE. See EVIDENCE, 23, 24; FIRE INSURANCE; LIFE INSURANCE.

INTENT. See AGENCY, 2.

INTEREST. See APPEAL FROM PROBATE, 1; BONDS, 4; PARTNERSHIP, 2; STATUTE OF LIMITATIONS.

INTERSTATE COMMERCE. See GAMBLING, 1.

INTOLERABLE CRUELTY. See DIVORCE, 2.

INTOXICATING LIQUORS.

1. In an action to recover the amount of a liquor license bond the plaintiff alleged that the licensee was duly convicted of "selling and exposing for sale on Sunday," etc., in violation of § 3097 of the General Statutes, "as amended by the Public Acts of 1895." The record of such conviction was also referred to and made part of the complaint. In this record it appeared that the licensee had been charged with and had pleaded guilty to the commission of two offenses: one of violating the provisions of the Act of 1895, which prohibited giving away liquor in saloons on Sunday, and the other of keeping open on Sunday in violation of the provisions of § 3097. The defendants admitted all the allegations of the complaint, and thereupon the trial court rendered judgment for the plaintiff. *Held* that the Act of 1895 did not amend § 3097 of the General Statutes, but created a new and distinct offense, a conviction of which did not work a forfeiture of the license bond. *Jacobs, Treas.*, v. *Holgenson et al.*, 68.
2. But that the complaint, although defective in form, did, as a whole, substantially allege the conviction of an offense under § 3097 of the General Statutes, and that such conviction worked a forfeiture of the bond. *Ib.*
3. That it was immaterial to the present case whether the sentence in the liquor prosecution was imposed upon one or both counts, or was illegal; inasmuch as the bond was forfeited by the conviction, no appeal having been taken. *Ib.*

INVENTORY. See EVIDENCE, 20.

JOINT TRESPASSERS. See JUDGMENT, 7; TRESPASS.

JUDICIAL NOTICE. See TRADE-MARK, 3.

JUDGE OF PROBATE. See INSANE PERSONS, 1–3.

JUDGMENT.

1. The identity of parties necessary to support an estoppel by judgment does not exist if the suitors do not occupy the same individual or representative capacity in each suit. *Clarke's Appeal from Probate*, 195.
2. A judicial determination in an action of ejectment, that no mutual mistake existed between the parties (grantor and grantee) as to

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JUDGMENT—*Continued.*

the boundaries and extent of the land bargained for, as averred by the grantor (defendant) in her cross-complaint, does not preclude the latter, when again sued in ejectment by the grantee in respect to the same land, from alleging and proving that the conduct of the grantee since the conveyance has been such as to estop him from asserting his title to the strip of land in dispute. The two claims are essentially different, and the estoppel could not properly have been inserted in the cross-complaint and litigated in the former action. *Kashman* v. *Parsons*, 295.

3. In the second action the grantor (defendant) alleged that at the time of her conveyance to the plaintiff she claimed the strip in dispute as hers, as the plaintiff well knew, and did not include it in the land sold to the plaintiff. These averments were denied by the plaintiff. *Held* that the record of the former judgment was admissible and conclusive in support of this denial. *Ib.*

4. Where the issue raised by the pleadings is as to whether a certain request for a finding of facts in a former action between the same parties, was filed, the party holding the affirmative of this issue has the right to introduce a copy of such request, irrespective of the question whether the proceedings in which it was filed did or did not result in a judgment conclusive of the present controversy. *Ib.*

5. A special finding in an equitable action, made for the purpose of taking an appeal, has no conclusive effect upon the parties in a collateral suit, except to explain the scope of the judgment, where that is doubtful upon its face. *Ib.*

6. An action to recover damages from the defendant, a business competitor of the plaintiff, for a malicious attachment of the plaintiff's goods and the consequent injury to his business, is not barred by a former judgment in favor of the plaintiff in an action of replevin against the attaching officer alone, to regain possession of the goods attached together with damages for their wrongful detention. The causes of action are different and distinct. *Vincent* v. *McNamara*, 332.

7. An unsatisfied judgment against one of two joint trespassers for the damages resulting from the trespass, does not bar a later suit for the same damages against the other. *Ib.*

8. The plaintiff sought to have certain deeds executed and delivered by him to the defendant, canceled and adjudged void. The defendant was his sister. He alleged in his complaint that the deeds were absolutely without consideration and had been given to prevent his wife from obtaining dower in the event of his death, but that such purpose had been abandoned by the parties shortly after the delivery of the deeds; that the defendant had for years thereafter treated the property as still the plaintiff's, and had never asserted the slightest ownership to the land therein conveyed until recently, when she became incensed against him and caused the deeds to be recorded and mortgaged the property for $5,000 for her own benefit. In a prior action between the same parties litigating in the

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JUDGMENT—*Continued.*

same right, the plaintiff alleged that the defendant was in possession of the same deeds, which she had caused to be recorded, but that he, the plaintiff, had never executed or delivered said deeds to the defendant; and prayed that they might be canceled and set aside. The defendant admitted the possession and recording of the deeds, but denied the averments respecting their nonexecution and delivery by the plaintiff. Upon this issue judgment was rendered for the defendant, and this judgment was pleaded by the defendant in bar of the present action. *Held* that the invalidity of the deeds at the time they were recorded, and not the ground of such invalidity, constituted the essential element of the plaintiff's cause of action. *Wildman* v. *Wildman*, 700.

9. That inasmuch as such invalidity was alleged in each complaint and formed the wrong or injury complained of, the causes of action set forth in the two suits were identical, and the judgment in the earlier suit operated as a bar to the maintenance of the present action. *Ib.*

See also APPEAL TO THE SUPREME COURT, 20; COSTS; DAMAGES, 4; FINDING OF COURT, 3–5; PRACTICE, 2; RECEIVER, 7; REPLEVIN; TRADE-MARK, 1, 5.

JUDGMENT LIEN. See DEEDS, 1; JURISDICTION.

JURISDICTION.

A court whose jurisdiction is limited to cases in which the matter in demand does not exceed $500, cannot adjudicate the validity and priority of a mortgage given to secure a note for $1,900, although the determination of that issue is auxiliary to the foreclosure of a judgment lien for an amount less than $500. The causes of action are separate and distinct. *Cantoni et al.* v. *Betts*, 386.

See also APPEAL TO THE SUPREME COURT, 17; AUDITORS, COMMITTEES AND REFEREES, 1; COURT OF PROBATE; ERASING FROM DOCKET, 1; WILLS CONSTRUED, 11.

KNOWLEDGE. See ATTORNEY AND CLIENT, 1; SALES, 4.

LACHES. See INJUNCTION, 1, 2.

LANDLORD AND TENANT. See SUMMARY PROCESS, 1, 2.

LARCENY.

1. The trial court charged the jury that if the accused, knowing he had no claim to the money, obtained possession of it openly, but by deception, artifice or fraud, and subsequently converted it to his own use, they would be justified in finding that the taking was with felonious intent and that larceny had been committed. *Held* that while this statement, detached from the context, was open to criticism, the instructions as a whole were correct, intelligible and sufficient for the guidance of the jury. *State* v. *Kallaher*, 398.

2. In the charge the trial court said to the jury that theft was included in the crime of robbery, but that in its opinion the proof in

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LARCENY—*Continued.*
the present case would not warrant a conviction for the latter offense. *Held* that while this remark was irrelevant, it afforded the accused no just ground of complaint. *Ib.*
See also EVIDENCE, 16–18.
LEASE. See SUMMARY PROCESS, 1, 2.
LICENSE. See INTOXICATING LIQUORS, 1–3.
LIEN. See TAXATION, 6, 7; WAREHOUSE RECEIPT, 5.
LIFE ESTATE. See WILLS CONSTRUED, 25.
LIFE INSURANCE.
1. A member of a mutual benefit association originally designated his wife and two sons as the beneficiaries of his insurance policy or certificate, but afterwards changed such designation and made his wife the sole beneficiary. Two or three years before his death the assured requested his sons to carry the policy thereafter and relieve their mother, who had hitherto paid all the dues and assessments, from that burden; they agreed to this and for about a year did pay the assessments, but then stopped and the payments were continued by the wife, as before. In an action of interpleader brought by the association after the member's death, the sons claimed that upon the foregoing facts there was an implied agreement or trust which entitled them to two thirds of the insurance money. *Held* that, viewed in the most favorable light, such claim could not be supported, inasmuch as the sons had not paid the consideration upon which such trust or agreement was conditioned. *Masonic Mut. Ben. Asso.* v. *Tolles et al.*, 537.
2. A consideration is as essential to an implied as to an express contract. *Ib.*
3. The beneficiary named in a certificate of insurance in a mutual benefit association has no vested interest in the sum insured, until the death of the member. Up to that time the member may, if permitted by the laws of the association, change the beneficiary at will, although the latter may have advanced money to pay the assessments on the certificate or policy. *Ib.*
4. The charter and laws of a fraternal association provided that death benefits should be paid to such person or persons, belonging to the immediate family of the deceased member, as he might designate, and that in default of any designation the fund should go to those members of such family, or to relatives, who were the decedent's heirs at law. *Held* that this provision had reference to the conditions existing at the death of the member. *Knights of Columbus* v. *Rowe et al.*, 545.
5. An unmarried man living in his father's family became a member of the plaintiff association, and in the certificate designated his father as his beneficiary. Subsequently he married and lived with his wife and newly born child apart from his father's family. While so living he died without having changed the original designation of his father as his beneficiary. *Held* that his wife and child constituted his immediate family and were entitled to the fund. *Ib.*

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LIFE INSURANCE—*Continued.*

6. The defendant, a life insurance company, issued certain participating tontine endowment policies upon the "reserve dividend plan." *Held* that the meaning of the expression quoted, and the nature and extent of the obligations assumed by the company under the terms and conditions of its policies, were questions of law, and could not be concluded by any finding of fact by the trial court. *Fuller et ux.* v. *Metropolitan Life Ins. Co.*, 647.

7. The policies in question, most of which were for a term of ten years, provided among other things that at the end of the stipulated period the defendant would pay each of the persistent and surviving policy-holders his equitable proportion of the reserve dividend fund in cash; that an equitable surrender value would be allowed only at such time as a dividend might, by the terms of the policy, be due and payable; and that no policy should be entitled to share in the dividend surplus until the expiration of its term, or until the end of a reserve dividend period. This method of disposing of the surplus the policy termed the "reserve dividend plan." The plaintiffs contended that by the terms of the policies the defendant incurred certain fixed liabilities, payable to the surviving policy-holders of the class at the end of the stipulated period, the amount of which equalled the sum of the usual yearly dividends and the total legal reserves on lapsed policies, increased by compound interest and undiminished by losses, death claims or expenses. *Held* that this claim could not be supported, whether the policies were construed alone or in the light of a canvassing pamphlet used by the defendant and entitled "Key to the Reserve Dividend Plan;" that the obligation assumed by the company was the distribution in cash to its surviving policy-holders of the surplus on hand at the end of the class period, after having paid the cost of insurance, the expenses of management chargeable to these policies, and providing for the future cost of insurance on continuing policies. (*Two judges dissenting.*) *Ib.*

8. That if the contention of the plaintiffs were adopted, the insurance contracts would become mere mutual wagers upon the chances of life, without any element of protection, and consequently void. (*Two judges dissenting.*) *Ib.*

9. It is one of the fundamental conditions of mutual insurance that dividends must be derived from the overpayments of policy-holders, and that there can be no dividend, annual or otherwise, unless at the time there is a surplus in the hands of the company. *Ib.*

LIFE TENANT. See ADVERSE POSSESSION.

LIQUOR LICENSE. See INTOXICATING LIQUORS, 1–3.

MALICE. See EVIDENCE, 11; JUDGMENT, 6.

MARKET VALUE. See DAMAGES, 5.

MARRIAGE. See WILLS CONSTRUED, 22.

MASTER AND SERVANT.

1. At the request of the municipal authorities the defendants agreed

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MASTER AND SERVANT—*Continued.*

to use a common pole in certain streets, and the shifting of the wires from the old to the new poles was undertaken by the telephone company. *Held* that there was no absolute rule of law which imposed the duty of inspecting and testing the guy-wires and circuit-breakers of the street railway company, upon the telephone company rather than upon its employés who shifted the wires. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.

2. Whether the master or servant should discharge this duty of inspection in a particular case, depends upon a variety of circumstances, and in some instances becomes a question of fact for the determination of the trial court. *Ib.*
3. The rule exempting the master from liability for an injury to one of his servants caused by the negligence of another, is too firmly established to be reversed or seriously modified by the judicial power. *Nolan, Admx.* v. *N. Y., N. H. & H. R. Co.*, 159.
4. The reason for the general rule of law which requires the master to exercise due care to provide his servant a safe place in which to work, is that the master is ordinarily in the possession or control of the premises where the work is done. But where he has no such possession or control, actual or legal, and merely sends his servant to the premises of another to do certain work there, requested by the latter, the master does not incur any legal responsibility to the servant for the unsafe condition of such premises, unless, indeed, he specially, or upon the facts found impliedly, assumes such obligation. *Channon* v. *Sanford Co.*, 573.
5. The facts in the present case reviewed and held insufficient to justify an implied assumption of such an obligation. *Ib.*

See also EVIDENCE, 23, 24; NEGLIGENCE, 7; QUESTIONS OF LAW, 2.

MECHANICS LIEN. See NONSUIT, 2.

MEMORANDUM OF DECISION. See APPEAL TO THE SUPREME COURT, 3, 4.

MILL PRIVILEGE. See INJUNCTION, 2.

MISTAKE. See JUDGMENT, 2.

MONUMENTS. See DEEDS, 2.

MORTGAGE.

1. A debt fully secured by mortgage upon a tract of land which is afterwards divided and sold in several parcels at one time to different purchasers, should, as between them, be so apportioned that each parcel will bear its fair share of the whole debt. The mortgagee ought not to release his security as to any parcel in such a manner as to increase the burden on the rest; and if he, with notice of the conveyances out of which the purchasers' equities arise, sees fit to release any parcel for less than its full share of the whole debt, he will, nevertheless, be chargeable in equity with the receipt of that share, in favor of the owners of the other parcels, in a suit to foreclose the mortgage. *Brooks* v. *Benham et al.*, 92.
2. An oral offer by a mortgagee, at an auction sale of the mortgaged

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MORTGAGE—*Continued.*
premises, to let certain sums "remain" on each parcel of the tract sold, does not constitute an apportionment of the mortgage incumbrance. Unless accepted, such offer amounts to nothing; and if accepted it can be made obligatory, in view of the statute of frauds, only by conveyances between the parties. *Ib.*
3. An apportionment of the mortgage incumbrance made between the mortgagee and purchasers of certain parcels of the mortgaged tract, cannot affect purchasers of other parcels who were not consulted and gave no consent. *Ib.*
4. At common law and by the general principles of equity, a mortgage debt is not satisfied by the mere acceptance of a conveyance of the equity of redemption in a part of the mortgaged premises. *Ib.*
See also JURISDICTION.
MUNICIPAL CORPORATIONS.
1. A town treasurer cannot bind the town by his acceptance of an illegal town order. *Goodwin* v. *East Hartford et al.*, 18.
2. A town is not estopped from setting up the illegality of an order drawn upon its town treasurer, merely because it has passed into the hands of a *bona fide* holder. Although such orders may be transferable by delivery or indorsement, they do not possess the full characteristics of commercial paper,—freedom from all legal and equitable defenses in the hands of a *bona fide* holder. *Ib.*
See also ACTION, 1, 2; GRADE CROSSINGS, 5–7; HIGHWAYS, 1, 3, 5; INJUNCTION, 2; NEGLIGENCE, 2; STREET RAILWAYS, 1.
MUTUAL BENEFIT ASSOCIATIONS. See LIFE INSURANCE, 1–5; VOLUNTARY ASSOCIATIONS, 1, 2.

NAVIGATION. See WHARF, 1–5.
NEGLIGENCE.
1. The conclusions of the trial court as to negligence and contributory negligence cannot be reviewed upon appeal, unless it appears that an incorrect standard of duty was applied, or some rule or principle of law, applicable to the facts found, was violated. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.
2. At the request of the municipal authorities the defendants agreed to use a common pole in certain streets, and the shifting of the wires from the old to the new poles was undertaken by the telephone company. *Held* that there was no absolute rule of law which imposed the duty of inspecting and testing the guy-wires and circuit-breakers of the street railway company, upon the telephone company rather than upon its employés who shifted the wires. *Ib.*
3. Whether the master or servant should discharge this duty of inspection in a particular case, depends upon a variety of circumstances, and in some instances becomes a question of fact for the determination of the trial court. *Ib.*
4. A telephone lineman who knows, or has reasonable cause to believe that the wires of an electric street railway company are in a dangerous condition, is bound to use due care, in view of such

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NEGLIGENCE—*Continued.*

knowledge, to avoid injury to himself, notwithstanding the negligence of the railway company. *Ib.*

5. A plaintiff's right of recovery in an action of negligence rests upon and must be confined to the proximate cause of injury which is alleged and proved. But if that is done, it is immaterial that another proximate and concurring cause is incidentally disclosed by the evidence. *Ashborn* v. *Waterbury*, 551.
6. The plaintiff sought to recover damages for personal injuries alleged to have been caused by the defendant's neglect to maintain a railing along the edge of a highway embankment. *Held* that evidence that the plaintiff stepped into a slight depression or hollow in the highway and stumbled and fell off the embankment, was admissible, not to show a different proximate cause of injury from that alleged, but as tending to prove that at the time of the accident the plaintiff was in the exercise of due care. *Ib.*
7. The mere fact that an employé of an electric light company, while trimming a lamp at the top of a pole, did not support himself in precisely the same way that his instructor had done, cannot be held to be negligence, as matter of law. The question is not whether the employé performed his work in exactly the manner that his instructor did, but did he exercise ordinary care under all the circumstances. *McQuillan* v. *Willimantic Elec. Light Co.*, 715.

See also EVIDENCE, 23, 24; HEARING IN DAMAGES; HIGHWAYS, 3; MASTER AND SERVANT, 3–5; RAILROADS, 1–5.

NEGOTIABLE PAPER. See BILLS AND NOTES; WAREHOUSE RECEIPT, 1–5.

NEW TRIAL. See APPEAL TO THE SUPREME COURT, 20; TRADE-MARK, 5; VERDICT AGAINST EVIDENCE, 1, 2.

NEXT FRIEND. See ACTION, 3.

NON-RESIDENT STOCKHOLDERS. See TAXATION, 1–9.

NONSUIT.

1. A nonsuit ought not to be granted in cases tried either to the court or to the jury, if substantial evidence is produced by the plaintiff in support of his cause. *Foskett & Bishop Co.* v. *Swayne et al.*, 74.
2. In an action against husband and wife to foreclose a mechanic's lien, the plaintiff offered evidence that the wife owned the house upon which the improvements were made, that she took part in selecting the materials, gave directions concerning the work, in some instances countermanded the orders of her husband, and at times evinced an expectation to pay for the labor and materials. *Held* that upon this evidence judgment might reasonably have been rendered against the wife, and that such evidence, at all events, should have protected the plaintiff from a nonsuit. *Ib.*
3. A plaintiff should not be nonsuited if there is any conflict of testimony as to the existence of the fact relied upon as the ground of nonsuit. In case of such conflict the credibility of the witnesses and the weight of the evidence are matters for the determination of the jury. *Cohen* v. *Schneider*, 505.

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NOTICE. See HIGHWAYS, 3; PLEADING, 11; RECEIVER, 1–4; WAREHOUSE RECEIPT, 4, 5.

OFFICE. See DAMAGES, 3, 4.
OYSTER GROUNDS. See WHARF, 5.

PARENT AND CHILD. See VARIANCE.
PARTIES. See ACTION, 1; JUDGMENT, 1.
PARTNERSHIP.

1. In an action for an accounting by one partner against another, after dissolution, a consideration of the unsettled accounts of a still earlier copartnership between the same parties, not alluded to in the pleadings, is a matter outside the issue and for that reason may be properly disregarded. *Buckley* v. *Kelly*, 411.
2. It is the duty of a partner who takes possession of the assets of a copartnership upon its dissolution, for the purpose of winding up its affairs, to do so within a reasonable time. If he neglects to do this and uses the firm property in his own private business, he is, after the lapse of such reasonable time, chargeable with interest on the balance which, upon an accounting, is found due to his copartner. *Ib.*

PAYMENT. See EVIDENCE, 13; MORTGAGE, 4; STATUTE OF LIMITATIONS.
PENDING SUITS. See PLEADING, 11.
PERPETUITIES. See WILLS CONSTRUED, 24.
PERSONAL LIBERTY. See INSANE PERSONS, 1.
PERSONAL PROPERTY. See SALES, 1, 3, 4.
PERSONAL REPRESENTATIVES.

The term "personal representatives" has acquired no fixed, technical meaning. It may under certain circumstances be held to include trustees in insolvency and receivers, as well as executors and administrators; for the former for some purposes as truly represent the debtor as the latter do the deceased. *In re Wilcox and Howe Co.*, 220.

PLEADING.

Amendment; common counts.

1. It is the duty of the trial court to see that a complaint which contains the common counts only, is amended before the cause is heard, by striking out all of the counts to which the plaintiff's bill of particulars does not relate. *Brewster* v. *Aldrich et al.*, 51.

Value of work; variance.

2. In an action upon the common count for work and labor, the plaintiff's bill of particulars alleged that the work was done at an agreed price, the amount of which was stated. *Held* that the plaintiff might prove and recover the reasonable value of his work and labor, notwithstanding such allegation of a specific contract price. *Ib.*

Effect of finding upon defects.

3. A finding of issues for the plaintiff operates in the same manner

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PLEADING—*Continued.*

upon formal defects in the complaint, as does the verdict of a jury. *Jacobs, Treas.*, v. *Holgenson et al.*, 68.

Answer not a demurrer.

4. An answer admitting all the allegations of the complaint cannot be treated as a demurrer, so far as formal defects in the complaint are concerned. *Ib.*

Defense of premature suit not available unless pleaded.

5. In an action to recover the balance of the contract price for stone furnished, the defendants answered that they had been obliged to pay freight on the stone and also had been compelled to have a portion of the stone recut; and the parties were at issue as to how much was paid by the defendants for freight and what, if anything, was paid for recutting the stone. *Held* that under our present system of pleading the defendants could not avail themselves of the defense that the suit was prematurely brought; that such a defense was consistent with the truth of the material allegations of the complaint, and should have been pleaded in some form by the defendants if they intended to prove it. *Southey et al.* v. *Dowling et al.*, 153.

Premature suit how pleaded in defense.

6. Whether such a defense should be set up by way of a plea in abatement or by way of answer, *quære*. *Ib.*

General demurrer insufficient.

7. A demurrer to the effect that all the allegations of the answer are insufficient in law to justify the grievance set forth in the complaint, is too general. *Bristol* v. *New England R. Co.*, 305.

Joinder of defenses.

8. In its answer the defendant set up two distinct defenses: the first consisting of admissions and denials of the allegations of the complaint, and the second of an alleged justification. Whether these defenses ought not, under the rules of the Practice Act, to have been alleged as a single defense, *quære*. *Ib.*

Erasing from docket.

9. A cause is not to be erased from the docket unless the want of jurisdiction plainly appears on the face of the record. *Wheeler et al.* v. *New York, N. H. & H. R. Co.*, 326.

Summary process; formal defect.

10. In an action of summary process to recover leased premises because of a subletting by the tenant, the complaint failed to aver that such subletting was without the written consent of the lessor or his assigns, as provided in the lease. *Held* that the omission was a defect of form and not of substance. *Schroeder* v. *Tomlinson*, 348.

Hearing in damages; notice by defendant; rules.

11. Chapter 220 of the Public Acts of 1897 provides that in a hearing in damages after a default or demurrer overruled, the defendant shall not be permitted to offer evidence to contradict the allegations of the plaintiff's complaint, unless he shall have given written notice of his intention so to do and of the subject-matter which he

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PLEADING—*Continued.*

intends to contradict; and that the judges of the Superior Court shall make rules as to the form of such notices and manner of filing the same. *Held* that the Act prescribed a mere rule of procedure and affected pending suits as soon as, but not until, rules had been made by the judges. *Hubbard* v. *N. Y., N. H. & H. R. Co.*, 563.

See also AGENCY, 3; AMENDMENT, 2; APPEAL TO THE SUPREME COURT, 8, 9; CONTRACTS; DIVORCE, 4; EVIDENCE, 9; FINDING OF COURT, 1; FRAUD, 1, 4; GRADE CROSSINGS, 1–4; INTOXICATING LIQUORS, 2; JUDGMENT, 2–4; NEGLIGENCE, 5, 6; PARTNERSHIP, 1; RECEIVER, 5.

POLICEMAN. See HIGHWAYS, 3.

POWERS. See WILLS CONSTRUED, 17, 18.

PRACTICE.

1. The clerk of the Supreme Court of Errors who makes up and has charge of the docket for the judicial district at any term, is the only clerk with whom to file original papers presented during the term. But where such papers are required to be filed before the opening of the term to which the appeal is taken, they may be filed either with the clerk for the county in which the judgment appealed from was rendered, or with the clerk for the county in which the term is to be held. *Vincent* v. *McNamara*, 332.

2. A writ of error from the Supreme Court of the United States may be addressed directly to the Superior Court, where the judgment sought to be reviewed was rendered by that court pursuant to the direction of this court given upon a reservation; and this is now the correct method of procedure in such cases. *Clarke's Appeal from Probate*, 483.

See ACTION, 3; AMENDMENT, 2; APPEAL FROM PROBATE, 2; APPEAL TO THE SUPREME COURT, 4, 6, 8, 17, 21; ATTORNEY AND CLIENT, 2; AUDITORS, COMMITTEES AND REFEREES, 1, 2; CHARGE OF COURT, 2; ERASING FROM DOCKET, 1; ERROR, 2; EVIDENCE, 12; FINDING OF COURT, 1, 3–5; HEARING IN DAMAGES; HIGHWAYS, 2; INSANE PERSONS, 3; NONSUIT, 1, 2; PLEADING, 1, 3–6, 11; RECEIVER, 1–4, 11; TRESPASS; VERDICT AGAINST EVIDENCE, 1, 2.

PRACTICE ACT. See PLEADING, 8.

PRESCRIPTION. See ADVERSE POSSESSION; WAYS, 2, 4.

PRINCIPAL AND SURETY. See RECOGNIZANCE, 2.

PROBATE COURT. See COURT OF PROBATE.

PROCHEIN AMI. See INFANT.

PROPOSED FINDING. See FINDING OF COURT, 4, 5.

PROXIMATE CAUSE. See NEGLIGENCE, 5, 6.

QUANTUM MERUIT.

1. A *quantum meruit* recovery for work and labor performed under a special contract not strictly complied with, is only permitted where the plaintiff was not in willful default, and the defendant has availed himself of the benefit of the services under circumstances sufficient to raise an implied promise to pay for their reasonable value. *Jones* v. *Marlborough*, 583.

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QUANTUM MERUIT—*Continued.*

2. There can be no such implication in the case of ordinary repairs of a highway, made under contract with a town by one who receives an annual salary therefor, the payment for which is expressly made dependent upon the acceptance of the work by the highway inspector, when such acceptance is rightly refused. *Ib.*

QUESTIONS OF FACT. See APPEAL TO THE SUPREME COURT, 6, 7; CHARGE OF COURT, 2; EVIDENCE, 17; MASTER AND SERVANT, 2; VOLUNTARY ASSOCIATIONS, 1.

QUESTIONS OF LAW.

1. The plaintiff's intestate was killed in a rear-end collision upon the defendant's railway, which was alleged to have been caused by its negligence in failing to give telegraphic information to each of the colliding trains, of the position of the other, and in failing to exercise proper supervision of the movement of said trains. From the special facts found, the trial court inferred that the rules and regulations of the defendant did not sufficiently provide for the emergency, and for the reasonably safe operation of the colliding trains, and held the defendant guilty of negligence in this respect. These rules and regulations formed a part of the record, and the trial court found that for the general movement and operation of trains they were the best and safest general rules yet devised by the best railroad talent in the country. *Held* that the inference of the trial court as to the existence of an emergency and the adequacy of the rules, was, in view of all the facts stated in the record, a conclusion in respect to a matter of law, and therefore reviewable by this court. *Nolan, Admx.*, v. *N. Y., N. H. & H. R. Co.*, 159.
2. That the giving of telegraphic information to the colliding trains was not, upon the facts specially found, a duty imposed upon the defendant by law; and consequently its failure to give such information violated no legal right of the intestate. *Ib.*
3. That the conditions attending the colliding trains did not differ essentially from those generally attending trains moving in the same direction, and did not create an exceptional situation or emergency unprovided for by the rules. *Ib.*
4. The defendant, a voluntary benevolent association, alleged that the bill of exchange upon which it was sued was given for a purpose foreign to and in violation of its constitution and by-laws. This averment the plaintiff denied. *Held* that the extent of the defendant's powers under its constitution and by-laws was a question of law for the court, while the purpose for which the bill of exchange was in fact given, was a question for the determination of the jury. *Court Harmony* v. *Court Lincoln*, 634.

See also APPEAL TO THE SUPREME COURT, 6, 7; LIFE INSURANCE, 6; NEGLIGENCE, 7.

RAILROAD COMMISSIONERS. See GRADE CROSSINGS, 1–4, 6, 7.

RAILROADS.

1. The plaintiff's intestate was killed in a rear-end collision upon the

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RAILROADS—*Continued.*

defendant's railway, which was alleged to have been caused by its negligence in failing to give telegraphic information to each of the colliding trains, of the position of the other, and in failing to exercise proper supervision of the movement of said trains. From the special facts found, the trial court inferred that the rules and regulations of the defendant did not sufficiently provide for the emergency, and for the reasonably safe operation of the colliding trains, and held the defendant guilty of negligence in this respect. These rules and regulations formed a part of the record, and the trial court found that for the general movement and operation of trains they were the best and safest general rules yet devised by the best railroad talent in the country. *Held* that the inference of the trial court as to the existence of an emergency and the adequacy of the rules, was, in view of all the facts stated in the record, a conclusion in respect to a matter of law, and therefore reviewable by this court. *Nolan, Admx.*, v. *N. Y., N. H. & H. R. Co.*, 159.

2. That the giving of telegraphic information to the colliding trains was not, upon the facts specially found, a duty imposed upon the defendant by law; and consequently its failure to give such information violated no legal right of the intestate. *Ib.*
3. That the conditions attending the colliding trains did not differ essentially from those generally attending trains moving in the same direction, and did not create an exceptional situation or emergency unprovided for by the rules. *Ib.*
4. A railroad company is bound to enforce as well as to adopt adequate rules for the movement of its trains. *Ib.*
5. The case of *Sprague, Admx.*, v. *New York & New England Railroad Co.*, 68 Conn. 345, explained and distinguished. *Ib.*

See also GRADE CROSSINGS, 1–7; HIGHWAYS, 6–9.

RAPE.

1. By the common law of this State the crime of rape necessarily includes the lesser offense of an attempt to commit rape, of which the accused may be convicted upon an information charging the greater crime. *Rookey* v. *The State*, 104.
2. Section 1407 of the General Statutes provides that anyone who shall, "with actual violence, make an assault upon the body of any female, with intent to commit a rape," shall be imprisoned, etc.; and that any person indicted for rape may be convicted of the offense mentioned in that section. *Held* that this section did not create a new statutory offense nor alter the former course of procedure, but merely prescribed a new penalty for an existing common-law offense. *Ib.*
3. Upon an information in the usual form charging rape, the jury found the accused "guilty of the crime of attempt at rape." *Held* that this was, in legal effect, a verdict finding the accused guilty of "an assault with actual violence upon the body of a female, with intent to commit the crime of rape," as provided in § 1407, and

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RAPE—*Continued.*
designated with sufficient clearness and certainty the crime of which he was found guilty under the information. *Ib.*
RATIFICATION. See AGENCY, 2, 3; EVIDENCE, 1, 2.
REAL ESTATE. See EQUITABLE CONVERSION; WILLS CONSTRUED, 11–14.
REASONS OF APPEAL. See APPEAL TO THE SUPREME COURT, 2, 5, 15.
RECEIPT. See FINDING OF COURT, 1.
RECEIVER.
Removal of receiver.
1. Under the statutes of this State a receiver may be removed at any time, at the pleasure of the court; or, if the court is not actually in session, and the exigencies of the case require it, by any judge of the Superior Court, after due notice given. *In re Premier Cycle Mfg. Co.*, 473.
Notice de removal.
2. Five days' notice to a receiver of a petition for his removal, is due notice. *Ib.*
3. Notice of such petition should be given to the plaintiffs and defendant in the receivership suit; but if they have actual notice, interpose no objection and take no appeal, the defect cannot avail the receiver upon his appeal from an order removing him. *Ib.*
4. Notice of such petition to every creditor who has proved his claim is not necessary. *Ib.*
Removal of receiver; evidence; pleadings.
5. In the present case the petition alleged that the receiver had neglected to pay certain bills which he had been ordered by the court to pay, but contained no other specific charges of negligence. The receiver answered, denying the negligence charged, and alleging that he had never done or omitted any act the doing or omission of which was prejudicial to the interests committed to his charge; that he had never disregarded any orders of court, but had sought its authority in advance of every important step. These allegations the petitioner denied. *Held* that upon these pleadings the door was open to a full investigation of all the doings of the receiver, and of whatever might affect his fitness to discharge the duties of his position. *Ib.*
6. A receiver has no vested right of office, and cannot appeal, either as receiver or in his personal capacity, from an order of removal by a tribunal having jurisdiction. *Ib.*
Irrelevant expressions in finding de removal of receiver.
7. A judgment removing a receiver will not be reversed because a finding, prepared for the purpose of an appeal, and collateral to the judgment, contains certain expressions importing the personal liability of the receiver for debts contracted and losses incurred in the continuance of the business. Such conclusions of the trier form no part of the judgment of removal, and cannot be used against the receiver upon any subsequent accounting, or in any other suit. *Ib.*

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RECEIVER—*Continued.*

Application to sell; discretion.

8. The denial of an application of a receiver for authority to sell certain property of the estate at auction, rests in the sound discretion of the trial judge. *Ib.*

Evidence de removal.

9. Conduct of a receiver prior to his appointment may be relevant to show that his personal interests conflict with those of general creditors, and that he is for that reason not a fit person to continue as receiver. *Ib.*

Who should not be appointed receiver.

10. It is only under exceptional circumstances that the principal manager of an insolvent company can with propriety be made its receiver; and such an appointment should never be made where his personal interests may conflict with those of creditors. *Ib.*

Receiver's counsel should not act for his successor, when.

11. Counsel for the original receiver ought not to be permitted to act for his successor in office, in any inquiry in which the administration of the original receiver is attacked. *Ib.*

Claim of non-resident creditor when properly disallowed.

12. A non-resident creditor of an insolvent corporation in the hands of a receiver in this State, having a claim for $700, sued the corporation in his own State and factorized a debt due to it there amounting to $1,000 or more; subsequently he presented his claim to the receiver in this State but refused to release his attachment. At the date of this attachment the garnishee was, apparently, able and willing to pay its debt to the receiver, but since that time had itself gone into the hands of a receiver, and it did not now appear how much, if anything, could be recovered from the garnishee. *Held* that the refusal of the creditor to release his attachment deprived his claim of all equity, and justified the receiver in disallowing it. *In re Greeley & Co.*, 494.

Secured creditors; distribution of estate.

13. The rule applicable to secured creditors in the distribution of the property of an insolvent debtor whose estate is in settlement in the Court of Probate (General Statutes, § 590), applies also to secured creditors of an insolvent corporation in the hands of a receiver. *Ib.*

See also PERSONAL REPRESENTATIVES; SALES, 1-3.

RECOGNIZANCE.

1. Section 896 of the General Statutes provides that before a non-resident shall commence a suit in this State, he shall "enter into a recognizance" to the adverse party "with some substantial inhabitant of this State as surety," or some "substantial inhabitant of this State" shall enter into a recognizance, conditioned that the plaintiff shall prosecute his action to effect. In 1885 surety companies of other States were authorized (General Statutes, §§ 3787, 3790), upon complying with certain conditions, to transact business in this State, and might "be accepted as surety upon the bond of any person or corporation required by the laws of this

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RECOGNIZANCE—*Continued.*

State to execute a bond, in lieu of any surety or sureties as now required by law." *Held* that this legislation, being remedial in character, ought to receive a liberal construction in order to accomplish its beneficial purpose; and that so construed it authorized the acceptance of the bond or "recognizance" of a surety company for costs in a civil action begun by a non-resident. *Lovejoy et al.* v. *Isbell*, 557.

2. In giving a recognizance for costs the bondsman's undertaking is that of a surety, although the plaintiff is not formally joined as principal. *Ib.*

RECORD. See APPEAL TO THE SUPREME COURT, 3, 4; ERASING FROM DOCKET, 1; FINDING OF COURT, 3; SALES, 1–5.

RELEASE. See FINDING OF COURT, 1.

REMEDY AT LAW. See INJUNCTION, 1.

REMONSTRANCE. See AUDITORS, COMMITTEES AND REFEREES, 1, 2.

RENT. See STATUTE OF LIMITATIONS.

REPLEVIN.

Judgment for a return of the property, authorized by statute to be rendered upon the withdrawal of a replevin suit, does not involve any adjudication of the title to such property, nor estop the surety in the replevin bond, when sued thereon, from proving, in mitigation of damages, that his principal in fact owned the property replevied but not returned in compliance with the judgment. *Fielding* v. *Silverstein*, 605.

See also EVIDENCE, 1, 7, 20; JUDGMENT, 6.

REQUEST FOR FINDING. See EVIDENCE, 15; FINDING OF COURT, 3–5.

RESERVATION. See PRACTICE, 2.

RES GESTÆ. See EVIDENCE, 21.

RESIDENCE. See DIVORCE, 1.

RES JUDICATA. See JUDGMENT.

RESTRAINT OF MARRIAGE. See WILLS CONSTRUED, 22.

RETENTION OF POSSESSION. See SALES, 5.

REVERSION. See ADVERSE POSSESSION.

RIGHT OF WAY. See WAYS.

RIPARIAN PROPRIETOR. See INJUNCTION, 2.

ROBBERY. See LARCENY, 1, 2.

RULES. See PLEADING, 11.

RULES UNDER THE PRACTICE ACT.

Rule II, § 3, p. 12. Variance, 54.
" III, § 1, p. 14. Act by known agent to be so stated, 262.
" IV, § 6, p. 16. Proof under a general or special denial, 158.
" IV, § 12, p. 17. What constitutes an issue of fact, 302.

SALES.

1. Chapter 212 of the Public Acts of 1895 provides that all contracts for the sale of personal property (with certain exceptions) conditioned that the title thereto shall remain in the vendor after delivery,

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SALES—*Continued.*

shall be in writing, and acknowledged and recorded within a reasonable time in the town clerk's office in the town where the vendee resides; and that all sales not so made shall be held to be absolute sales, except as between the vendor and the vendee "or their personal representatives." *Held* that in view of the remedial nature of the statute, the receiver of an insolvent corporation, who had come into possession of certain machinery which had been purchased by the corporation under conditional contracts of sale not made in conformity with the statute, ought not, in respect to such property, to be regarded as the "personal representative" of the corporation, but rather as the agent of creditors, whose rights he was appointed to protect and enforce; and therefore that the machinery must be regarded as the absolute property of the corporation, so far as it might be needed by the receiver for the payment of debts. *In re Wilcox and Howe Co.*, 220.

2. A chattel mortgage not recorded until long after the receiver of the mortgagor had taken possession of the property, is not valid as against him. *Ib.*
3. Recitals in a chattel mortgage or conditional contract of sale, which might perhaps have estopped the vendee from claiming that the instrument had not been properly recorded, cannot estop the latter's receiver, since in this particular he represents creditors. *Ib.*
4. The absolute title to personal property in the possession of a vendee under an unrecorded contract of conditional sale, passes to his trustee in insolvency, notwithstanding the latter had actual knowledge, before the assignment, of the terms of the conditional sale, and afterwards had notice of the debtor's failure to make the stipulated payments. Such knowledge upon the part of the trustee cannot affect the creditors of the insolvent debtor. *National Cash Register Co.* v. *Woodbury*, 321.
5. The Act of 1895 in relation to conditional sales of personal property (Public Acts of 1895, Chap. 212), has not changed the law of this State in respect to the retention of possession by the vendor of such property; goods so retained are still open to attachment by the vendor's creditors although the sale was made and recorded as prescribed by the Act of 1895. *Cohen* v. *Schneider*, 505.

See also BONDS, 1; CONTRACTS; FRAUD, 2.

SENTENCE. See INTOXICATING LIQUORS, 3.

SERVICE OF PROCESS. See DAMAGES, 3, 4.

SET-OFF. See AGENCY, 4.

SEWER. See INJUNCTION, 2.

STATUTE OF FRAUDS. See MORTGAGE, 2.

STATUTE OF LIMITATIONS.

The plaintiff occupied a store of the defendant, and it was agreed between the parties that the rent as it became due should be applied upon the plaintiff's account for clothes. The last rent became due April 1st, 1882, when the defendant owed the plaintiff a large amount. *Held* that the application of the rent to the plaintiff's

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STATUTE OF LIMITATIONS—*Continued.*

bill was a payment by the defendant on that date, which prevented the statute of limitations from running against the plaintiff's claim until that time. *Held* also, that inasmuch as the mutual accounts ceased April 1st, 1882, the plaintiff was entitled to interest by way of damages, upon the balance due him, from that date to the date of judgment. *McKeon* v. *Byington*, 429.

STATUTE OF PERPETUITIES.

1. *H*, who owned land in fee, subject to the life use of his sister *C*, quitclaimed all his title to "the children of *C* who shall be alive at her decease, and the issue of any child or children, if there be any, their heirs and assigns, in equal shares *per stirpes*, to have and to hold unto the said releasees, their heirs and assigns forever." The deed stated that the intent was "to release to my sister's (*C's*) children this property, which their grandfather intended to convey to them by will." At its date *C* was 61 years old and had six children living, and five grandchildren, the children of one of her sons. In a suit to determine the respective rights of the parties, it was *held* that the main object of the grantor evidently was to provide for the ownership and enjoyment of the land after *C's* decease. *Hewit et al.* v. *New York, N. H. & H. R. Co.*, 638.
2. That the possibility that some of the members of the class described therein as grantee,—a class whose membership could not be definitely ascertained until *C's* death,—might be persons who were neither in being when the deed was delivered, nor the immediate issue of such persons, rendered the whole conveyance invalid under the statute (General Statutes, § 2952) against perpetuities then existing. *Ib.*
3. A covenant to stand seized to uses, or a declaration of trust, intended to serve an estate in land forbidden by statute, is void *ab initio*. *Ib.*

See also WILLS CONSTRUED, 17.

STATUTES REFERRED TO OR COMMENTED ON.

SECTION.	SUBJECT-MATTER.	PAGE.
1	Pending suits affected by Act *de* procedure,	565
445	Executors, etc., making payments *bona fide*, protected,	375
553	Executor of an executor,	375
564	Executor to administer intestate property also,	375
581	Limitation for presenting claims against estate of deceased,	515
590	Payment of secured creditor of an insolvent,	497
612	Surrender of estate by an executor to his successor,	375
617	Settlement of account of deceased executor or admr.,	375
632	Distribution of intestate estates,	211, 287
640	Probate appeal; interest of appellant,	456–459
809	Matter in demand in actions of foreclosure,	389
873	All demurrers must be special,	318
874	What matters must be specially pleaded,	157
896	Bond for prosecution in case of non-resident plaintiff,	560–562
979	Voluntary associations; their powers,	637

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STATUTES REFERRED TO OR COMMENTED ON—*Continued.*

SECTION.	SUBJECT-MATTER.	PAGE.
989	Withdrawal of suits in vacation,	384
990	Costs when taxed on withdrawal of case,	382–385
1000	Circumstantial defects no ground of abatement,	331, 351
1101	Province of court and jury in jury trials,	509, 719
1109	Judgment of nonsuit,	74
1111	Records and findings of courts,	503
1135	What alleged errors will not be considered on appeal,	134
1169	Execution may issue against a voluntary association,	637
1184	Return and record of levy on real estate,	354
1319	Removal of receivers,	478
1323, 1325, 1327,	Action of replevin,	340
1330	Pleading in replevin,	16
1358	Remedy by summary process extends to grantee of lessor,	357
1407	Assault with intent to commit rape,	107–114
1579	Embezzlement by public officer, executor, etc.,	274, 375
1580	Embezzlement; elements of the offense,	270, 274
1923	Lien of corporation on stock of stockholders,	602
1942	Receivership; distribution of effects of insolvent co.,	498
1992	Duties of sheriffs,	149, 150
2552	Loans, contracts, etc., for gaming purposes, void,	490
2553	Money or property lost in gaming may be recovered,	490
2556	Betting on horse-races prohibited,	490
2557	Gambling on public conveyances,	490
2558	Gambling elsewhere than on a public conveyance,	490
2673	Railroad Co. liable for injury on highway, when,	396
2674	*et seq.* Compulsory repair of highways by towns,	102
2677	Appeal from decision *de* repair of highways; scope of appeal,	103
2802	Causes for divorce; "intolerable cruelty,"	426, 427
2806	Residence necessary in divorce cases to give court juris.,	426
2952	Statute against perpetuities,	292, 614
2961	Deeds must be recorded,	355
2964	Record of unacknowledged or defective deed,	354
3018	Mechanic's lien; "consent of the owner,"	75
3034	Judgment lien,	277
3064	Condition of liquor license bond,	71, 73
3097	Liquor selling on Sunday,	71, 72
3425	Superior Court has jurisdiction of appeals from R. R. comrs.,	328
3481	Highway crossing railroad, how constructed,	394
3491	Superior Court has jurisdiction of appeals from R. R. comrs.,	328
3499	Guard rails at grade crossings,	396, 397
3787–3801	Bonds by surety companies,	559
3836	Taxation of ins. co.; deduction on account of realty,	603, 604
3837	Taxation; returns of names of stockholders to assessors,	598, 604
3901	Taxes a debt recoverable by suit,	602
3916	Tax on stock of non-resident stockholders,	598
3917	Lien of co. for tax paid on stock of non-residents,	589, 601
3930	Board of equalization; finality of its action,	604

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STATUTES REFERRED TO OR COMMENTED ON—*Continued.*

SECTION.	SUBJECT-MATTER.	PAGE.
3946	Local control over the erection of electric wires, etc.,	64
3971	Negotiability of warehouse receipts,	85, 86

PUBLIC ACTS.

1885	Chap. 107, p. 468	Giving of surety bonds by foreign cos.,	558
	" 108, p. 469	Corporate suretyship,	558
1887	" 126, p. 746	Free highways across the Conn. river,	36
1889	" 11, p. 9	Withdrawal of action before return day,	385
	" 141, p. 77	Clerk of Supreme Court of Errors,	337, 338
	" 162, § 6, p. 90	Insane person; temporary restraint,	251–261
	" 213, p. 129	Appeals from orders of r. comrs.,	328
	" 220, p. 134	Grade crossings; power of r. comrs.,	319
	" 220, § 6, p. 136	Appeals from r. comrs.,	328
1893	" 66, p. 237	Adversary titles to real estate,	87, 88
	" 169, § 3, p. 308	Location, etc., of electric railways,	64
	" 239, p. 395	Bridge over Conn. river at Hartford,	38
1895	" 68, p. 240	Statute prohibiting pool selling is constitutional,	486–494
	" 96, p. 491	Dissolution of attachments by appointment of receiver,	232
	" 108, p. 499	Appointment of receivers; powers of judge in vacation,	478
	" 212, p. 563	Conditional sale of personal property,	228–234, 324, 510
	" 251, p. 592	Giving away liquors; prohibited hours,	71, 72
	" 315, p. 655	Improvement of public roads; liability of county,	437–439
1897	" 135, p. 844	Filing of papers in hearings before judges of the Superior Court,	332
	" 153, p. 857	Stock of non-residents how taxed,	599
	" 194, §§ 2, 13, 22, p. 891	Appeal to Supreme Court,	331
	" 194, §§ 6, 7, p. 889	Request for and finding of facts,	504
	" 194, § 29, p. 895	Appeal from decision setting aside verdict as against the evidence,	445
	" 194, § 30, p. 895	Pleas in abatement in Supreme Court,	338, 339
	" 194, § 31, p. 895	Appeal from decision of Superior Court judge,	332
	" 205, p. 905	Taxation; return of non-resident stockholders to assessors,	598, 602
	" 220, p. 924	Hearing in damages; notice; rules of judges,	564, 565

STREET RAILWAYS.

It is not unlawful for a telephone company and an electric street railway company to use the same poles in a city street; especially when requested to do so by the municipal authorities. *Bergin, Admr.*, v *So. New Eng. Tel. Co. et al.*, 54.

See also HIGHWAYS, 6–9; NEGLIGENCE, 2, 4.

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SUMMARY PROCESS.

1. In an action of summary process to recover leased premises because of a subletting by the tenant, the complaint failed to aver that such subletting was without the written consent of the lessor or his assigns, as provided in the lease. *Held* that the omission was a defect of form and not of substance. *Schroeder* v. *Tomlinson*, 348.
2. Under our statute (§ 1358) the grantee of leased premises succeeds to the lessor's remedy of summary process for a forfeiture of the lease. *Ib.*

See also ABATEMENT, PLEA IN.

SUPERIOR COURT. See AUDITORS, COMMITTEES AND REFEREES, 1.

SUPREME COURT OF ERRORS. See APPEAL TO THE SUPREME COURT, 11, 17.

SURETY. See RECOGNIZANCE, 1, 2; REPLEVIN.

SURETY COMPANY. See RECOGNIZANCE, 1, 2.

TAX. See WAREHOUSE RECEIPT, 4, 5.

TAXATION.

1. No provision of the Federal or State Constitution forbids our legislature from passing laws, the effect of which is to tax the shares of stock of Connecticut corporations owned by aliens at a higher rate than like shares owned by resident stockholders. *State* v. *Travelers Ins. Co.*, 590.
2. The question whether such alleged discriminatory legislation is void as against citizens of other States, under Art. 4, § 2, of the Constitution of the United States which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, will not be considered, unless it appears from the record that the non-resident stockholders, in whose behalf such claim is made, are citizens of other States. *Ib.*
3. The declaration in the 14th amendment to the Federal Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws, applies only to those persons who are physically present within the territorial jurisdiction of the State, the protection of whose laws they invoke. *Ib.*
4. A State has the right to debar aliens from holding stock in its corporations, or to admit them to that privilege upon such terms as it may prescribe; for the right of corporate association under the protection of an artificial personality, and of doing business on its credit, is a franchise granted by the State to such, and such only, as she may deem fit to be entrusted with its exercise. *Ib.*
5. Chapter 153, § 2, of the Public Acts of 1897, requiring certain corporations to pay to the State an annual tax of one and one half per cent upon the market value of their stock owned by non-residents, although in form a tax against the corporation, is in substance a tax against each of its non-resident stockholders. *Ib.*
6. The Act of 1897 increased the tax upon the stock held by non-residents from one to one and one half per cent of its value, but made no change in § 3917 of the General Statutes which gave the

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TAXATION—*Continued.*

corporation paying the tax a lien upon the stock of each non-resident stockholder to the extent of one per cent of its value. *Held* that the defendant was not thereby deprived of its property without due process of law, inasmuch as General Statutes, § 1923, gave it a lien at all times upon all stock owned by any one of its stockholders, for all debts due to it from him. *Held*, also, that every non-resident stockholder who became such after the passage of the Act of 1897, or continued to hold his stock thereafter until the tax day in October, might fairly be deemed to have assented to any payment which the corporation could be legally compelled to make in his behalf, and so to have come under a contractual obligation to repay the moneys so advanced. *Ib.*

7. The sovereign power which creates a corporation can give its capital stock a *situs* within the State for purposes of taxation; and this is accomplished by a law taxing and imposing a lien upon the shares there. *Ib.*

8. The Act of 1897 applies to shares of "stock liable to taxation and not otherwise taxed." *Held* that a tax upon the property of the defendant which gave these shares their value, was not the same thing as a tax upon the shares of stock owned by non-residents. *Ib.*

9. General Statutes, § 3930, provides that the valuation affixed by the corporation to the stock of non-residents shall be revised by the state board of equalization, whose valuation "shall be final." *Held* that this did not preclude the courts, in a suit to recover the tax, from correcting any errors in the mathematical process by which such valuation was reached. *Ib.*

TELEGRAPH AND TELEPHONE COMPANIES.

It is not unlawful for a telephone company and an electric street railway company to use the same poles in a city street; especially when requested to do so by the municipal authorities. *Bergin, Admr.*, v. *So. New Eng. Tel. Co. et al.*, 54.

See also GAMBLING, 1–3; NEGLIGENCE, 2, 4.

TEMPORARY RESTRAINT. See INSANE PERSONS, 1–3.

THEFT. See LARCENY, 2.

THREATS. See EVIDENCE, 16, 18.

TIDE-WATER. See WHARF, 1–5.

TITLE. See ADVERSE POSSESSION; BONDS, 1; EVIDENCE, 1; EXECUTION, 1, 2; JUDGMENT, 2; REPLEVIN; SALES, 4; WAREHOUSE RECEIPT, 1; WILLS CONSTRUED, 11–14.

TOLL BRIDGE. See HIGHWAYS, 9.

TOWN. See MUNICIPAL CORPORATIONS.

TRADE-MARK.

1. In an action to restrain an infringement of the plaintiff's trade-mark, the defendant claimed and offered evidence that the word "Hygeia," constituting the alleged trade-mark, was in common use for business purposes long before its adoption by the plaintiff, and that the latter had acquiesced in its registration and use as a trade-

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TRADE-MARK—*Continued.*

mark by a third person. *Held* that in rebuttal the plaintiff might introduce the record of a judgment in its favor in an action against such third person for an infringement of its right. *Hygeia Distilled Water Co.* v. *Hygeia Ice Co.*, 516.

2. The plaintiff offered evidence to show that the products of both parties were on sale at the same or different places in the same city. *Held* that as relevant to that inquiry a witness who had made purchases might be permitted to state what article he called for and what he received. *Ib.*

3. In its defense the defendant contended that the word "Hygeia" had acquired the well defined secondary meaning of "healthful" or "health-giving," and as such was one of those common descriptive words that could not be lawfully appropriated as a trade-mark. *Held* that the question thus presented was to be determined by the trial court upon its judicial knowledge aided by reference to standard authorities, or by evidence, or by both. *Ib.*

4. In the present instance the court having heard evidence upon this point, decided against the defendant's contention. *Held* that upon the facts disclosed by the record this ruling was correct. *Ib.*

5. The trial court enjoined the defendant from engaging in any way or manner in the business of selling distilled water and products made therefrom, so long as it retained the word "Hygeia" as a part of its corporate name, and from using its corporate name, conspicuously or otherwise, in such business. *Held* that the facts found did not warrant such a sweeping decree, and that for this error the entire judgment must be set aside and a new trial be granted. *Ib.*

TRESPASS.

Where a trespass *quare clausum fregit* is jointly committed, the wrongdoers should ordinarily be sued jointly, and if sued severally, without due cause, the actions should be consolidated. *Nichols* v. *Peck*, 439.

TRIAL. See APPEAL TO THE SUPREME COURT, 6, 10; CHARGE OF COURT, 1; DIVORCE, 3, 4; ERROR, 2; EVIDENCE, 12; HIGHWAYS, 2; PLEADING, 1; VERDICT AGAINST EVIDENCE, 1, 2.

TRUST AND TRUSTEE.

1. Whenever trustees to whom a testator devises a vested remainder have or may have immediate active duties to perform in respect to that interest, they are entitled to qualify as such trustees without waiting for the termination of the life estate or for the filing of the executor's administration account. *Wheeler's Appeal from Probate*, 511.

2. If one of the two named as trustees declines or fails to qualify, the other may qualify alone and execute the trust. *Ib.*

See also LIFE INSURANCE, 1; STATUTE OF PERPETUITIES, 3; WILLS CONSTRUED, 17–20.

TRUSTEE IN INSOLVENCY. See INSOLVENCY, 1, 2; SALES, 4.

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UNITED STATES COURTS.

A writ of error from the Supreme Court of the United States may be addressed directly to the Superior Court, where the judgment sought to be reviewed was rendered by that court pursuant to the direction of this court given upon a reservation; and this is now the correct method of procedure in such cases. *Clarke's Appeal from Probate*, 483.

VARIANCE.

In his complaint the plaintiff sought to recover for clothes made and furnished for the use of the defendant and his sons, "the same being for their support," under an agreement that the defendant would pay the amount due on the account, on demand. *Held* that an objection to the allowance of a charge of $31, on the ground that it was for a suit of clothes ordered by the defendant for the use of one *O*, was a mere technicality devoid of merit, and was properly disregarded by the committee. *Held* also, that as all the clothes were furnished on the order and credit of the defendant, the question whether the clothes furnished to the sons were for their support, was immaterial. *McKeon* v. *Byington*, 429.

See also APPEAL TO THE SUPREME COURT, 4; FRAUD, 4; PLEADING, 2.

VENDOR AND VENDEE. See DEEDS, 1; FRAUD, 1; SALES, 1–5.

VERDICT. See PLEADING, 3; RAPE, 3.

VERDICT AGAINST EVIDENCE.

1. Great weight is due to the action of the trial court in setting aside a verdict as against the evidence, and this court will not feel justified in reversing such decision unless there are reasonably strong grounds requiring it to be done. *Loomis* v. *Perkins et al.*, 444.
2. The evidence in the present case reviewed and the action of the trial court in setting aside the verdict sustained. *Ib.*

VOLUNTARY ASSOCIATIONS.

1. The defendant, a voluntary benevolent association, alleged that the bill of exchange upon which it was sued was given for a purpose foreign to and in violation of its constitution and by-laws. This averment the plaintiff denied. *Held* that the extent of the defendant's powers under its constitution and by-laws was a question of law for the court, while the purpose for which the bill of exchange was in fact given, was a question for the determination of the jury. *Court Harmony* v. *Court Lincoln*, 634.
2. It is within the power of a voluntary benevolent association to give a promissory note or bill of exchange for the purpose of compromising a suit pending against it. *Ib.*

WAIVER. See APPEAL TO THE SUPREME COURT, 10.

WAREHOUSE RECEIPT.

1. The indorsement and delivery of a warehouse receipt transfers the legal title and the constructive possession of the property to the indorsee. *State Bank, etc.*, v. *Waterhouse, Jr.*, 76.

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WAREHOUSE RECEIPT—*Continued.*

2. Whether our statute (General Statutes, § 3971) gives to such receipts all the characteristics of negotiable paper, *quære*. *Ib.*
3. An agreement between a former owner and the warehouseman, that the goods should remain in the warehouse until the purchase price had been paid, cannot affect a subsequent *bona fide* indorsee without notice. *Ib.*
4. A warehouse receipt provided that certain barrels of whiskey were to be delivered upon surrender of the receipt, after the payment of the government tax "and all other amounts due." *Held* that the words quoted referred only to proper warehouse charges, and therefore gave no constructive notice to the indorsee that any lien existed in favor of a former owner for the purchase price of the whiskey. *Ib.*
5. In the case at bar the warehouseman having paid the government tax upon the whiskey, issued his receipt for the goods with the words "tax paid" stamped thereon. *Held* that as against the plaintiff, an indorsee without notice, the warehouseman was estopped from claiming a lien for the amount of the tax so paid. *Ib.*

WATERS. See INJUNCTION, 2; WHARF, 1–5.

WAYS.

1. The owner of a right of way may do whatever is reasonably necessary to make the way suitable and convenient for his use; but cannot justify a material deviation from the established route, merely because its entrance has become impassable owing to a lawful change in the grade of the highway. *Nichols* v. *Peck*, 439.
2. A way by prescription which runs in a defined course to a fixed point, is no more subject to variation by parol agreement or by acts and conduct, than if it had been created and so described by deed. *Ib.*
3. As matter of law, a way opening upon a highway through a certain gate cannot be regarded as substantially identical with a way joining a highway through another gate seventy feet distant. *Ib.*
4. The defendant, having a right of way by prescription over a farm which the plaintiff contemplated buying, was asked by the plaintiff, if he, the defendant, had "a regular right of way" over it, and answered in the negative. He was not informed of the purpose of the inquiry and had no intention of misleading the plaintiff; nor did it appear that the latter relied upon the statement in purchasing the farm. *Held* that under these circumstances the defendant was not estopped by his reply from asserting his right of way. *Ib.*

WHARF.

1. The privilege or right of wharfing out over tide water flats to navigable water is, at least so far as the same has not been actually exercised, subservient to the public right of navigation. *Lane* v. *Harbor Comrs.*, 685.
2. This privilege of wharfing is given to the owner of the upland to enable him to reach deep water; and if, as in the present case, deep water is brought nearer to him by the excavation of a new inshore

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WHARF—*Continued.*

channel duly authorized by the Federal and State governments, before he has actually wharfed out, there is no reason why this new channel should not thereafter mark the limit of his wharfing privilege. *Ib.*

3. In 1892 the board of harbor commissioners for New Haven harbor granted a permit to the plaintiff to extend his wharf about 426 feet, whereupon he did build out about one half the authorized distance, and then stopped. In 1896 the secretary of war and a majority of said harbor commissioners, unknown to the plaintiff, gave other wharf owners permission to dredge a new channel at their own expense nearer the shore in front of their land and that of the plaintiff, and after that channel had been dug the board of harbor commissioners modified the wharfing permit issued to the plaintiff in 1892, and limited his right of extension to the line of the new channel. In an appeal from this action it was *held* that the digging of the new channel did not constitute a taking of the plaintiff's land or property which required compensation under the Federal and State constitutions. *Ib.*
4. That the board of harbor commissioners, as agents of the State and in the interest of public navigation, had full power to modify the permit of 1892, and that the manner in which this power was exercised afforded the plaintiff no just ground of complaint. *Ib.*
5. That the plaintiff's right to cultivate oysters upon the soil excavated for the new channel, was held subject to the right of the State and of the United States to cut a channel there if the improvement of navigation required it. *Ib.*

WIDOW. See WILLS CONSTRUED, 3.

WILLS CONSTRUED.

Class gift per stirpes.

1. A Connecticut testator gave a pecuniary legacy to "the heirs" of a deceased niece. *Held* that the legacy vested as a class gift, *per stirpes*, in those persons who constituted her heirs at the time of the testator's death, without regard to whether they answered that description at the time of her decease. *Ruggles, Exr.*, v. *Randall et al.*, 44.

Signification of "heirs."

2. The word "heirs," when used in a will, primarily signifies those entitled by law to inherit by descent the real estate of a deceased person; and a resort to secondary meanings of the word will ordinarily be had, only when adherence to the primary meaning would make the provision under consideration ineffectual or plainly unreasonable. *Ib.*

Widow not an "heir.

3. In this State the widow is not an "heir" of her deceased husband, within the primary signification of that word. *Ib.*

Gift to husband and wife; each take half.

4. The testator gave his niece *K* "and her husband" $500, and provided that if he, the testator, survived them (which was not the

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WILLS CONSTRUED—*Continued.*

case), "said sum so intended for her" should become part of the residue of his estate. *Held* that *K* and her husband each took $250. *Ib.*

Gift to heirs of neices; their husbands do not take.

5. A provision for the heirs of certain nieces gives nothing to the surviving husbands of such nieces. *Ib.*

Division of money gift.

6. After giving $400 each to *A*, *B* and *C*, the will provided that if the testator survived either or all of them, then said $400 should be paid "to their or to each of their heirs." *Held* that this meant that the legacy to each was to be divided among the heirs of each, not that each of such heirs was to get $400. *Ib.*

Description of legatees; legatees "named."

7. The residuary clause of the will authorized the executor to convert the whole estate into money and pay the "legatees named," and if there was not enough to pay them in full, then to make a proportional deduction from each "legacy named;" and directed that if there was a surplus it should go to "all the legatees named in this will, to be equally divided among them all, all to share and share alike and in equal amounts of the same." *Held* that all those who were to receive bequests were equally "named," whether described by their individual names, or as members of a class, like "heirs" or "children," or as occupying a certain relation to another, such as a "husband." *Ib.*

Division among classes of legatees.

8. That the surplus was not to be divided *per capita* among all those who might take as legatees, but among the classes of legatees, each class, however numerous, being treated as a unit for this purpose. *Ib.*

"Die without issue"; general rule.

9. Under the well settled rule of construction in this State a devise over, provided the first devisee should "die without issue," takes effect only when the first devisee dies without issue during the lifetime of the testator; unless, indeed, a contrary intent is sufficiently declared in the will. *Lawlor* v. *Holohan et al.*, 87.

10. Expressions in the will in question reviewed, and *held* not to indicate a contrary intent upon the part of the testator. *Ib.*

Equitable conversion; conflict of laws.

11. The question whether the language of a will works an equitable conversion of real estate into personalty, is one to be determined by the courts of the testator's domicil, in so far as the land in that State is concerned. *Clarke's Appeal from Probate*, 195.

Decision of other States; their effect.

12. But such determination is not obligatory as a rule of decision, upon the courts of other States, in a controversy between different parties, in respect to the title or succession to lands there situate, either under the principles of general jurisprudence or the Constitution and laws of the United States. *Ib.*

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WILLS CONSTRUED—*Continued.*

No equitable conversion.

13. The provisions of the will of a South Carolina testatrix reviewed, and *held* not to work an equitable conversion of her Connecticut real estate into personalty. *Ib.*

International comity; limitations.

14. The rules of international comity do not require the courts of this State to accept the interpretation placed upon a will by the courts of the testator's domicil, where such interpretation directly involves the mode of passing title to lands in this State. *Ib.*

Class gift; per capita distribution.

15. A testator gave the residue and remainder of his estate, real and personal, "to my nephews and nieces, they being my lawful heirs." *Held* that the nephews and nieces took as a class and were entitled to a *per capita* distribution of the property so bequeathed to them. *Post, Exr.*, v. *Jackson et al.*, 283.

Extrinsic evidence inadmissible.

16. Extrinsic evidence is inadmissible in the construction or interpretation of a will where the language of a testator is free from ambiguity. *Ib.*

"Lawful heirs"; statute of perpetuities.

17. After providing for his wife, a testator divided the residue of his property equally among his three children. By a codicil he revoked the gift to one of his daughters and in lieu thereof gave her share to his wife in trust, to be conveyed and paid over to the daughter "as my said wife may deem for the interest and welfare of my said daughter;" and directed that any portion of the trust property, principal or income, which should not be paid over or conveyed to his daughter during her life, should at her decease go to her "lawful heirs." The testator died in 1886 and the wife in 1895. The latter had paid over to the daughter the annual income from the trust property and a small portion of the principal. In a suit to determine the construction of the will, it was *held* that under the statute against perpetuities which was in force when the testator died, the gift over to the "lawful heirs" of the daughter was void. *Security Co.* v. *Snow et al.*, 288.

Discretionary powers of trustee purely personal.

18. That the discretionary powers accorded to the wife in the discharge of the trust were purely personal and terminated at her decease; and that thereupon the trust ceased to be susceptible either of complete execution, or of partial execution in such a way as to satisfy the testator's design. *Ib.*

Revocation of a certain provision held to affect entire trust.

19. That the revocation of the original provision for the daughter was indissolubly coupled with the substituted trust provision, and effectual only so far as that was effectual. *Ib.*

20. That upon the wife's decease the former provision stood in its original force and carried the entire trust estate to the daughter in fee simple. *Ib.*

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WILLS CONSTRUED—*Continued.*

Doctrine of approximation limited.

21. The doctrine of approximation can never be invoked where its application would sacrifice the main object of a testator to one of his incidental purposes. *Ib.*

Conditional limitation; restraint of marriage.

22. By one clause of his will a testator gave the residue of his property, real and personal, to his wife, and in a later clause provided that if she married after his decease she should take but one third of such residue. The will made no further disposition of the property. About nine years after the testator's death the widow remarried, and in a suit to determine the construction of the will, it was *held* that the title acquired by the widow under the will, in two thirds of the residue, was a conditional limitation, which determined *ipso facto* upon her remarriage, when such portion of the residue became intestate estate; and that such limitation was not void as an unlawful restraint of marriage. *Bennett, Exr.*, v. *Packer et al.*, 357.

Dower; sharing in personalty.

23. That the gift to the widow was in lieu of dower, but that she was entitled, under the statute of distribution, to one third of the intestate personal property. *Ib.*

Common law rule of perpetuities; provision valid.

24. A testator gave the use of a portion of his property to *A*, and "at his decease to go to his legal heirs." *Held* that this bequest was not obnoxious to the common law rule against perpetuities, now prevailing in this State; and that *A* having predeceased the testator, the gift vested in those persons who were the legal heirs of *A* at the testator's death. *Healy et al., Exrs.*, v. *Healy et al.*, 467.

Life estate.

25. In the 7th clause the testator gave to his sister *W*, one twentieth of the remainder of his estate, "at her decease to go to her legal heirs." *Held* that *W* took a life estate only. *Ib.*

Uncertainty; how avoided.

26. By the 9th clause the testator gave "to the legal heirs of my brother John's children," two twentieths of the remainder of his estate. *Held* that in order to conform to the testator's evident intent and avoid uncertainty, the words quoted should be construed as though they read, "to the legal heirs of my brother, John's children." *Ib.*

"Legal heirs"; how construed.

27. The gift in the 10th clause was to the "legal heirs" of my brother *M*. The will showed that *M* was living and that the testator knew it. *Held* that the expression "legal heirs" was used in the popular sense, as indicating those persons who, if *M* had died simultaneously with the testator, would have inherited his estate. *Ib.*

See also COURT OF PROBATE, 1.

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WITHDRAWAL OF ACTION. See APPEAL TO THE SUPREME COURT, 14; COSTS; REPLEVIN.
WITNESS. See APPEAL TO THE SUPREME COURT, 6.
WORK AND LABOR. See PLEADING, 2; QUANTUM MERUIT, 1, 2.
WRIT AND COMPLAINT. See ABATEMENT, PLEA IN.
WRIT OF ERROR. See PRACTICE, 2.
WORDS AND PHRASES.
Action, 235, *et seq.*
Cause of action, 707–712.
Die without issue 87, *et seq.*
Family, 545, *et seq.*
Heirs, 44, *et seq.*
Legal heirs, 467, *et seq.*
Pending, 235, *et seq.*
Personal representatives, 220, *et seq.*
Proceeding, 235, *et seq.*
Reserve dividend plan, 667–677.

Digitized by Google

TABLE OF CASES CITED IN THE OPINIONS.

Page

ARKANSAS.

Carville v. Jacks, 43 Ark. 439, 139
Railway Co. v. Hammond, 58 Ark. 324, 194

CALIFORNIA.

Grennan v. McGregor, 78 Cal. 258, 534
Shrader, Ex parte, 33 Cal. 279, 257
White v. Merrill, 82 Cal. 14, 447

CONNECTICUT.

Adams v. Way, 32 C. 160, 302
Alling v. Chatfield, 42 C. 276, 360
Alsop v. Mather, 8 C. 584, 374
Amer. Bd., etc., Appeal, 27 C. 344, 374
Ansonia v. Cooper, 64 C. 536, 17, 42
Ansonia Bank's Appeal, 58 C. 257, 98
Anthony v. Anthony, 55 C. 256, 361
Apthorp v. Backus, Kirby, 407, 647
Atwater v. Morning N. Co., 67 C. 504, 103, 174, 530
Auffmordt v. Stevens, 46 C. 411, 636
Averill v. Sawyer, 62 C. 560, 454

Bacon v. Fairman, 6 C. 121, 375
Bacon v. Parker, 12 C. 212, 448
Baldwin v. Greenwoods Turnpike Co., 40 C. 238, 555
Baldwin v. Walker, 21 C. 168, 110
Bank of Hfd. County v. Waterman, 26 C. 324, 150
Bartholomew v. Clark, 1 C. 472, 448
Batterson v. Hartford, 50 C. 558, 601
Beach's Appeal, 58 C. 464, 228
Beardsley v. Beecher, 47 C. 408, 277
Bishop v. Clay Ins. Co., 45 C. 430, 571
Bissell v. Dickerson, 64 C. 61, 445
Bloodgood v. Beecher, 35 C. 469, 175

Page

Boardman v. Meriden Britannia Co., 35 C. 402, 533
Booth v. Hart, 43 C. 480, 75
Boucher v. New Haven, 40 C. 456, 123
Buckingham's Appeal, 60 C. 143, 347
Burke v. Norwich & W. R. Co., 34 C. 474, 195
Burritt v. Belfy, 47 C. 323, 711
Bush v. Golden, 17 C. 594, 356

Calkins v. Lockwood, 17 C. 154, 719
Campbell's Appeal, 64 C. 277, 456
Camp's Appeal, 36 C. 88, 347
Camp v. Stevens, 45 C. 92, 328
Canastota Knife Co. v. Newington Tramway Co., 69 C. 146, 613, 614, 616, 633, 634
Canton v. Burlington, 58 C. 277, 75
Carstesen v. Stratford, 67 C. 428, 555, 556
Caulfield v. Hermann, 64 C. 325, 454
Chatfield v. Bunnell, 69 C. 511, 446
Chesebro v. Palmer, 68 C. 207, 90
Chipman v. Waterbury, 59 C. 496, 332
Clark v. Smith, 9 C. 379, 10 C. 1, 150
Clarke's Appeal, 70 C. 195, 483
Coe v. James, 54 C. 511, 90
Coe v. Stow, 8 C. 536, 355
Cohen v. Pemberton, 53 C. 221, 719
Comstock's Appeal, 54 C. 116, 332
Cone et al. Appeal, 68 C. 84, 378
Conn. Hospital, etc., v. Brookfield, 69 C. 1, 73
Conn. Trust, etc., Co. v. Security Co., 67 C. 438, 377, 379
Cook v. Catlin, 25 C. 387, 49
Cook v. Loomis, 26 C. 483, 564
Cook v. Morris, 66 C. 196, 75, 509
Corbin v. Amer. Mills, 27. C. 274, 175
Crouse v. Phœnix Ins. Co., 56 C. 176, 561
Cullen v. N. Y., etc., R. Co., 66 C. 211, 319, 397

Digitized by Google

	Page
Danforth v. Adams, 29 C. 107,	443
Darrigan v. N. Y., etc., R. Co., 52 C. 285,	195
Davenport v. Richards, 16 C. 310,	378
Davis v. Seymour, 59 C. 531,	544
Davis's Appeal, 39 C. 395,	457
Dean v. Mason, 4 C. 428,	453
Denison v. Denison, 16 C. 34,	389
Dennis v. Dennis, 68 C. 186,	427
Denton v. Danbury, 48 C. 368,	389
DeWolf v. Sprague Mfg. Co., 49 C. 282,	388
Dibble v. New Haven, 56 C. 199,	42
Dickerson's Appeal, 55 C. 223,	456
Dunham v. Averill, 45 C. 62,	294
Dunham v. New Britain, 55 C. 378,	257
Dundon v. N. Y., etc., R. Co., 67 C. 266,	64
East Haven v. Hemingway, 7 C. 186,	694
Edmond v. Canfield, 8 C. 87,	378
Enos v. Tuttle, 3 C. 247,	645
Evans's Appeal, 51 C. 435, 361,	362
Fairfield's Appeal, 57 C. 167,	319
Farmers', etc., Bank v. Payne, 25 C. 444,	325
Farrel v. Derby, 58 C. 234,	40
Farrel Foundry v. Dart, 26 C. 376,	325
Farrell v. Bridgeport, 45 C. 191,	121
Farrell v. Waterbury, H. R. Co., 60 C. 239,	193
Fayerweather v. Monson, 61 C. 431,	382
Feltz v. Walker, 49 C. 93,	140
Fish v. Sawyer, 11 C. 545,	354
Fisk v. Hartford, 69 C. 375,	729
Fitch v. Brainerd, 2 Day, 163,	110
Foot v. New Haven, etc., Co., 23 C. 214,	441
Ford v. Haskell, 32 C. 489,	645
Fowler v. Bishop, 32 C. 199,	389
Fox v. Tabel, 66 C. 397,	140
Gaylor v. Harding, 37 C. 508,	233
Gerrish v. New Haven Ice Co., 63 C. 9,	194
Gilpin v. Atwater, 29 C. 93,	453
Gold v. Judson, 21 C. 616,	48
Greene v. Sprague Mfg. Co., 52 C. 330, 232, 233,	457
Griffin v. Pratt, 3 C. 513,	72
Guarantee, etc., Co. v. Phila., etc., R. Co., 69 C. 709,	479
Hallock v. Smith, 50 C. 127,	515
Hamilton v. Nutt, 34 C. 501,	356
Hartford v. Hartford Electric Light Co., 65 C. 324,	732 121
Hatch v. Thompson, 67 C. 74,	103
Hawley v. Beardsley, 47 C. 571,	732
Hayden v. Allyn, 55 C. 280,	175
Hayden v. Conn. Hospital, 64 C. 320,	293
Healy v. Fallon, 69 C. 228,	419
Hewitt's Appeal, 53 C. 24,	378
Hewitt's Appeal, 58 C. 223,	457
Hine v. Roberts, 48 C. 267,	228
Hobbs v. Simmonds, 61 C. 235,	277
Hollister v. Union Co., 9 C. 436,	695
Holmes v. Williams, 1 Root 335,	110
Holyoke W. P. Co. v. Conn. River Co. (U. S. Cir. Ct.), 52 C. 570,	695
Hotchkiss' Appeal, 32 C. 353,	331
Hotchkiss v. Higgins, 52 C. 205,	8
Howard v. Howard, 19 C. 313,	287
Hoyt v. Danbury, 69 C. 341,	678
Huntington's Appeal, 30 C. 526,	361
Huntington v. McMahon, 48 C. 174, 260,	339
Huntley v. Holt, 58 C. 445,	75
Hurd v. Hubbell, 26 C. *389,	564
Hurlbut v. McKone, 55 C. 31,	530
Imlay v. Union B. R. Co., 26 C. 249,	613
Ives v. Carter, 24 C. 392,	135
Jackson v. Alsop, 67 C. 249, 286,	472
Jackson v. Emmons, 59 C. 493,	609
James v. Marvin, 3 C. 576,	294
James v. Morgan, 36 C. 348,	328
Jencks v. Phelps, 4 C. 149, 259,	260
Johnes v. Beers, 57 C. 295,	90
Jordan, M. & Co. v. Patterson, 67 C. 473,	636
Judson v. Blanchard, 3 C. 579,	647
Kashman v. Parsons, 70 C. 295,	480
Kelsey v. Hanmer, 18 C. 311,	190
Ketchum v. Corse, 65 C. 85,	294
Kimberly et ux. Appeal, 68 C. 428,	102
Leake v. Watson, 60 C. 498, 48, 292, 361,	642
Lee v. Barkhampsted, 46 C. 213,	396
Lewis v. McCabe, 49 C. 141,	510
Litchfield Bank v. Peck, 29 C. 384, 232,	233
Lockwood v. Crawford, 18 C. 361,	190

Digitized by Google

Page

Lockwood v. Reynolds, 16 C. 303, 457
Lockwood v. Weston, 61 C. 211, 603
Longstaff v. Hurd, 66 C. 350, 232
Loomis v. Bragg, 50 C. 228, 228
Loomis v. Knox, 60 C. 343, 277
Lord v. Lord, 23 C. 327, 360
Lyon v. Champion, 62 C. 75, 75

McAdam v. Central R. & E. Co., 67 C. 445, 64, 65, 181
McElligott v. Randolph, 61 C. 157, 578, 579
McGorty v. Southern N. E. T. Co., 69 C. 635, 65, 579
McNamara v. Lyon, 69 C. 447, 16
Main v. First School Dist., 18 C. 214, 382
Mallory's Appeal, 62 C. 218, 378, 379
Mansfield v. Lynch, 59 C. 320, 376
Mascolo v. Montesanto, 61 C. 50, 637
Mayhew v. Mayhew, 61 C. 233, 428
Mead v. Noyes, 44 C. 487, 175
Mechanics', etc., Bank, Appeal, 31 C. 63, 497
Merrills v. Tariff Mfg. Co., 10 C. 384, 341
Merwin v. Austin, 58 C. 22, 231, 457
Messer v. Wildman, 53 C. 494, 466
Minor v. Rogers, 40 C. 512, 347
Montville St. R. Co. v. New L. N. R. Co., 68 C. 418, 332
Morehouse v. Remson, 59 C. 392, 719
Morey v. Hoyt, 62 C. 542, 341
Morris v. Bolles, 65 C. 45, 49, 294
Morris v. Bridgeport Hydraulic Co., 47 C. 279, 530
Morris v. Platt, 32 C. 75, 253, 407
Mullen v. Reed, 64 C. 240, 48
Munson v. Munson, 30 C. 425, 706
Murray v. Jennings, 42 C. 9, 137

Neilson v. Hartford St. Ry. Co., 67 C. 466, 103
Nelson v. Pomeroy, 64 C. 257, 362
New Haven v. Rogers, 32 C. 221, 559
New Haven, M. & W. R. Co. v. Chatham, 42 C. 465, 325
New Haven & N. Co. v. State, 44 C. 376, 484
New Haven Wire Co. Cases, 57 C. 352, 232, 233, 489
New London City Bank v. Ware River R. Co., 41 C. 542, 10
New York Brew. Corp. v. Baker, 68 C. 337, 53

Page

New York & N. E. R. Co.'s Appeal, 62 C. 527, 319
New York & N. E. R. Co. v. Waterbury, 55 C. 19, 395
New York, etc., R. Co. v. Bridgeport Traction Co., 65 C. 410, 616
Nichols v. New Haven & N. Co., 42 C. 103, 601
Nolan v. New York, etc., R. Co., 70 C. 159, 442
Norton's Appeal, 46 C. 527, 456
Norwalk St. R. Co.'s Appeal, 69 C. 576, 480
Noyes v. Ward, 19 C. 250, 645

O'Donnell v. Sargeant Co., 69 C. 476, 340
Ormsbee v. Davis, 16 C. 567, 609
Osborne v. Troup, 60 C. 485, 102
Oviatt v. Pond, 29 C. 479, 341, 564

Palmer v. Gallup, 16 C. 555, 150
Parrott v. Housatonic R. Co., 47 C. 575, 564
Payne v. Farmers', etc., Bank, 29 C. 415, 331
Peck's Appeal, 50 C. 562, 294
Peck v. Smith, 1 C. 103, 614
Peltier v. Bradley, D. & C. Co., 67 C. 42, 67
Persse v. Watrous, 30 C. 139, 608
Phelps v. Norton, 35 C. 327, 332
Phelps v. Phelps, 55 C. 359, 90
Phelps v. Robbins, 40 C. 250, 90
Phillips v. Medbury, 7 C. 568, 360
Pinches v. Swedish E. L. Church, 55 C. 183, 589
Pinney v. Barnes, 17 C. 420, 376, 377
Pitkin v. New York, etc., R. Co., 67 C. 19, 332
Pixley v. Eddy, 56 C. 336, 230
Platt v. Birmingham Axle Co., 41 C. 255, 325
Prior v. Swartz, 62 C. 132, 694, 698

Quintard v. Knoedler, 53 C. 485, 73

Raymond v. Fish, 51 C. 80, 257
Redfield v. Buck, 35 C. 328, 332
Regan v. New York, etc., R. Co., 60 C. 124, 419, 564
Ripley v. Merchants' National Bank, 41 C. 187, 560
Robbins v. Coffing, 52 C. 118, 375
Robinson's Appeal, 63 C. 290, 228
Robinson v. Clapp, 65 C. 365, 355

Digitized by Google

Page

Rockwell v. Bradshaw, 67 C. 8, 217
Rockwell v. Taylor, 41 C. 55, 209, 645
Rood v. Welch, 28 C. 157, 233
Rose v. Bridgeport, 17 C. 243, 11, 12
Russell v. Hooker, 67 C. 24, 211
Russell v. Tuttle, 2 Root, 22, 139

St. John v. Dann, 66 C. 401, 90
Sanford v. Clark, 29 C. 457, 434
Sargent & Co. v. New Haven Stb. Co., 65 C. 116, 707, 712
Saunders v. Denison, 20 C. 521, 328
Schroeder v. King, 38 C. 78, 352
Scott v. Spiegel, 67 C. 349, 103
Selleck v. French, 1 C. 32, 12
Setchel v. Kiegwin, 57 C. 473, 719
Sharp v. Lockwood, 12 C. 155, 190
Shaw v. Smith, 48 C. 306, 233
Sheldon v. Kibbe, 3 C. 214, 314
Sheldon v. Rose, 41 C. 371, 360, 362
Sherwood v. Weston, 18 C. 32, 622
Shipman v. Ætna Ins. Co., 29 C. 245, 233
Shoninger v. Peabody, 57 C. 42, 18
Simpson v. Hall, 47 C. 417, 9
Sing Cheong Co. v. Wing, 59 C. 535, 190
Smith v. New Haven, 59 C. 203, 395
Society for Savings v. New London, 29 C. 174, 10
Sprague v. New York, etc., R. Co., 68 C. 345, 64, 65, 183
Stanton v. New York, etc., R. Co., 59 C. 272, 42
State v. Danforth, 3 C. 112, 112
v. Dowd, 19 C. 388, 113
v. Duffy, 57 C. 525, 719
v. Duffy, 66 C. 551, 504
v. Fenn, 41 C. 590, 409
v. Gaul, 50 C. 578, 114
v. Hoyt, 47 C. 518, 109
v. Keena, 64 C. 212, 110
v. Main, 69 C. 123, 532
v. New York, etc., R. Co., 60 C. 326, 602, 604
v. Nichols, 8 C. 496, 114
v. Parmelee, 9 C. 259, 113
v. Pinkerman, 63 C. 176, 121
v. Railroad Com'rs, 56 C. 308, 626
v. Royce, 68 C. 311, 601
v. Ryan, 68 C. 512, 72
v. Sargent & Co., 45 C. 358, 695
v. Setter, 57 C. 461, 112, 113
v. Shepard, 7 C. 54, 113
v. Smith, 52 C. 557, 379
v. Staub, 61 C. 553, 439
v. Wells, 31 C. 210, 114
v. Worden, 46 C. 349, 114

Page

State's Atty. v. Branford, 59 C. 402, 319, 320, 397
Stone v. McEckron, 57 C. 194, 90
Styles v. Tyler, 64 C. 432, 103, 124, 173, 174
Suffield v. New Haven & N. Co., 53 C. 367, 319
Supples v. Cannon, 44 C. 424, 705
Sutton v. Mansfield, 47 C. 388, 737
Swift v. Thompson, 9 C. 63, 233

Tallamadge v. New York, etc., R. Co., 66 C. 211, 397
Taylor v. Atwood, 47 C. 498, 233
Taylor v. Moore, 47 C. 278, 67
Terry v. Allen, 60 C. 530, 514
Thames Stb. Co. v. Housatonic R. Co., 24 C. 40, 75
Thorp v. Brookfield, 36 C. 320, 554
Thresher v. Dyer, 69 C. 404, 173, 177, 428, 530
Trinity College v. Hartford, 32 C. 452, 614
Tyler v. Waddingham, 58 C. 375, 175

Waddell-Entz Co., 67 C. 324, 497
Ward v. Ward, 59 C. 188, 175
Watertown Eccl. Soc.'s Appeal, 46 C. 230, 109
Webb v. Lines, 57 C. 154, 90
Webster v. Merriman, 9 C. 225, 515
Wheaton v. Dyer, 15 C. 307, 356
Wheeler v. Fellowes, 52 C. 238, 294
White v. Howd, 66 C. 264, 331
White v. White, 52 C. 518, 90
Whitney v. New Haven, 58 C. 450, 439
Wickwire v. State, 19 C. 477, 328
Wilcox & Howe Co., In re, 70 C. 220, 324, 326, 457, 510
Williams v. New York, etc., R. Co., 39 C. 509, 621
Williams v. Wadsworth, 51 C. 277, 457
Williams, State's Atty., v. New Haven, 68 C. 263, 439
Wilmerding v. Russ, 33 C. 67, 375
Wilson v. Willimantic Linen Co., 50 C. 433, 578
Winehouse v. Cronin, 68 C. 250, 544
Winsted Hosiery Co. v. New B. K. Co., 69 C. 565, 177, 442
Wood v. Wood, 63 C. 324, 550
Woodhouse v. Phelps, 51 C. 521, 375, 379
Woodruff v. Bacon, 34 C. 181, 382
Woodruff v. Bacon, 35 C. 97, 419
Woodruff v. Migeon, 46 C. 236, 286

Digitized by Google

Page

ENGLISH.

Barber v. Meyerstein, L. R. 4 H. L. 317, 85
Birtwhistle v. Vardill, 7 Cl. & Fin. 895, 210
Bright v. Eynon, 1 Burr. 390, 448
Bromley v. Wright, 7 Hare, 334, 50
Brown v. Brown, L. R. 1. P. & D. 46, 428
Cain v. Moon, 2 Q. B. 283 (1896), 347
Camden v. Fletcher, 4 Mee. & W. 378, 67
Cutter v. Powell, 2 Sm. L. C. (9th ed.) 1126 *n.*, 590
Duchess of Kingston's Case, 2 Sm. L. C. *573, 707
Glever v. Hynde, 1 Mod. Rep. 168, 255
Governor v. Meredith, 4 Term Rep. 794, 254
Hall v. Flanner, 1 Levinz, 196, 255
Handcock v. Baker, 2 B. & P. 260, 255
Humble v. Hunter, 12 Q. B. 310, 736
Hutchinson v. York, etc., R. Co., 5 Exch. 343, 195
Kelly v. Kelly, L. R. 2 P. & D. 31, 428
King v. Gourlay, 7 Barn. & Cress. 699, 261
Maleverer v. Spinke, 1 Dyer, 36 *b*, 254
Morgan v. Thorne, 7 M. & W. *400, 646
Peacock v. Bell, 1 Saund. 74 *b*, 328
Powell v. Powell, L. R. 1 P. & D. 209, 294
Priestley v. Fowler, 3 Mee. & W. 1, 195
Reignolds v. Edwards, Willes, 282, 442
Sims v. Bond, 5 B. & Ad. 389, 736
Stanian v. Davies, 2 Ld. Raym. 795, 328
Trotter v. Trotter, 4 Bli. N. S. 502, 218
Winford v. Powell, 2 Ld. Raym. 1310, 328
Young v. Lambert, L. R. 3 P. C. 142, 85

FLORIDA.

Trustees, etc., v. Lewis, 34 Fla. 424, 11
Williams v. McFadden, 23 Fla. 143, 137

Page

GEORGIA.

Goodrich v. Atlanta B. & L. Asso., 96 Ga. 803, 158
Guerard v. Guerard, 73 Ga. 506, 219

ILLINOIS.

Burton v. Curyea, 40 Ill. 320, 85
Carterville v. Cook, 129 Ill. 152, 555
Drew v. Beall, 62 Ill. 164, 137
Hale v. Hale, 125 Ill. 399, 217
Illinois C. R. Co. v. Neer, 31 Ill. App. 126, 180
McCartney v. Osburn, 118 Ill. 403, 212
Robbins v. Laswell, 58 Ill. 203, 419

INDIANA.

Logansport v. Uhl, 99 Ind. 531, 732
Nysewander v. Lowman, 124 Ind. 584, 137
State ex rel. Shirk v. Mullen, 50 Ind. 598, 150

KANSAS.

McCreary v. Hart, 39 Kan. 216, 447

KENTUCKY.

Lexington, etc., Co. v. Page et al., 17 B. Monroe, 412, 666

LOUISIANA.

Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 533, 534
Payne v. Dejean, 32 La. Ann. 889, 480

MARYLAND.

Colvin, In re, 3 Md. Ch. 278, 479
Harrison v. Mayor, 1 Gill, 264, 255, 257

MASSACHUSETTS.

Alger v. North End Sav. Bank, 146 Mass. 418, 347
Barry v. Page, 10 Gray, 398, 737
Boston Ice Co. v. Potter, 123 Mass. 28, 737
Brooks v. Hoyt, 6 Pick. 468, 150
Commonwealth v. Alger, 7 Cush. 53, 254
Commonwealth v. Cooper, 15 Mass. 187, 113
Commonwealth v. Marzynski, 149 Mass. 68, 534
Commonwealth v. Newell, 7 Mass. 245, 113

Digitized by Google

Page

Commonwealth v. Roby, 12 Pick. 496, 113
Crabtree v. Randall, 133 Mass. 552, 419
Cushing v. Breed, 14 Allen, 376, 85
Dunlap v. Watson, 124 Mass. 305, 419
Ellis v. Boston, etc., R. Co., 107 Mass. 1, 514
Ellis v. Page, 7 Cush. 161, 287
Farwell v. Boston & W. R. Corp. 4 Metc. 49, 195
Foster v. Graham, 166 Mass. 202, 737
Gannon v. Shephard, 156 Mass. 355, 76
Hayes v. Western R. Corp., 3 Cush. 270, 194
Homer v. Perkins, 124 Mass. 431, 132
Huntington v. Knox, 7 Cush. 371, 736
Ilsley v. Merriam, 7 Cush. 242, 736
Look v. Dean, 108 Mass. 116, 256
Marvel v. Babbitt, 143 Mass. 226, 374
Morse v. Hutchins, 102 Mass. 439, 135, 136
Morse v. Shaw, 124 Mass. 59, 132
National L. I. Co. v. Allen, 116 Mass. 398, 736
Oakes, In re Josiah, 8 Law Rep. 122, 256
Oliver v. Washington Mills, 11 Allen, 268, 601
Parker v. Moulton, 114 Mass. 99, 132, 133
Reeve v. Dennett, 137 Mass. 315, 448
Sedgwick v. Minot, 6 Allen, 171, 287
Smith v. First Nat. Bank, 99 Mass. 605, 447
Stickney v. Hammond, 138 Mass. 116, 294
Tash v. Adams, 10 Cush. 252, 732
Taunton v. Taylor, 116 Mass. 254, 257
Train v. Boston Disinfecting Co., 144 Mass. 523, 257
Winchester v. Howard, 97 Mass. 303, 736
Whitney v. Whitney, 14 Mass. *88, 287

MICHIGAN.

Eggleston v. Boardman, 37 Mich. 14, 737
Enright v. Railway Co., 93 Mich. 409, 180
Ford v. Ford, 80 Mich. 42, 219
Van Deusen v. Newcomer, 40 Mich. 90, 256

MINNESOTA.

Hicks v. Stone, 13 Minn. 434, 447
Iselin v. Simon, 62 Minn. 128, 158
Washburn v. Van Steenwyk, 32 Minn. 336, 218

MISSISSIPPI.

Crusoe v. Butler, 36 Miss. 150, 219

MISSOURI.

Cottrill v. Krum, 100 Mo. 397, 133
Fourth Nat. Bank v. St. Louis C. C. Co., 11 Mo. App. 333, 87

NEW HAMPSHIRE.

Atty.-Gen. v. Dublin, 38 N. H. 459, 534
Barton v. Provident M. R. A., 63 N. H. 535, 544
Colby v. Jackson, 12 N. H. 526, 255
Davis v. Merrill, 47 N. H. 208, 256
Keleher v. Putnam, 60 N. H. 30, 256
Keniston v. Sceva, 54 N. H. 24, 347
Page v. Parker, 43 N. H. 363, 137
Wentworth v. Farmington, 48 N. H. 207, 260

NEW JERSEY.

Cummings v. Cass, 52 N. J. L. 77, 140
Morris Canal Co. v. Fisher, 9 N. J. Eq. 667, 11
State v. Paterson, 40 N. J. L. 244, 732
Traphagen v. Jersey City, 29 N. J. Eq. 206, 732

NEW YORK.

Card v. Card, 39 N. Y. 317, 231
Chrysler v. Canaday, 90 N. Y. 272, 133
Coe v. Schultz, 47 Barb. 64, 257
Conner v. Belden, 8 Daly, 257, 479
Constant v. University of Rochester, 111 N. Y. 604, 282
DePeyster v. Amer. Fire Ins. Co., 6 Pai. Ch. 486, 666
Ellis v. Andrews, 56 N. Y. 83, 132, 133
First Nat. Bank v. Dean, 137 N. Y. 110, 85

Digitized by Google

Page
Godillot v. Harris, 81 N. Y. 263, 533
Hamilton v. White, 1 Seld. 9, 443
Hobson v. Hale, 95 N. Y. 588, 217
Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 534
Krumm v. Beach, 96 N. Y. 398, 135, 137
Lee v. Tower, 124 N. Y. 370, 218
Ludwig v. Gillespie, 105 N. Y. 653, 736
Pinkney v. Pinkney, 1 Bradf. 276, 362
Pryor v. Foster, 130 N. Y. 171, 135
Ridden v. Thrall, 125 N. Y. 572, 347
Ring v. Cohoes, 77 N. Y. 83, 556
Russell v. Mayor, 2 Denio, 461, 254, 257
Scott v. Eagle Fire Co., 7 Pai. Ch. 198, 666
Stevens v. Cooper, 1 John. Ch. 425, 97
Vail v. Reynolds, 118 N. Y. 297, 135, 137
Vanderbilt v. Adams, 7 Cow. 349, 254
Van Santen v. Standard Oil Co., 81 N. Y. 171, 87
Van Wormer v. Mayor, 15 Wend. 262, 254, 257, 261
Veeder v. Baker, 83 N. Y. 156, 708
White v. Howard, 46 N. Y. 144, 218
Whitney v. Allaire, 1 Coms. 305, 139
Williams v. Williams, 4 Thomp. & C. 251, 256

OHIO.

Crawford v. Delaware, 7 Ohio St. 459, 614
Fox v. State, 34 Ohio St. 377, 108
Hootman v. Shriner, 15 Ohio St. 43, 150

OREGON.

Elder v. Rourke, 27 Or. 363, 158

PENNSYLVANIA.

Beaver County v. Armstrong, 44 Pa. St. 63, 11
Cole v. High, 173 Pa. St. 590, 140
Commonwealth ex rel. Draper v. Kirkbridge, 3 Brew. 393, 256
Griswold v. Gebbie, 126 Pa. St. 353, 140
Harman v. Com., 12 Serg. & R. 69, 112
Hunt's and Lehman's Appeal, 105 Pa. St. 128, 217
Keefe v. Sholl, 181 Pa. St. 90, 140
Page's Estate, 75 Pa. St. 87, 218
Potts v. Smith, 3 Rawle, 361, 374
Rudy v. Ulrich, 69 Pa. St. 177, 294

RHODE ISLAND.

Allen v. Woonsocket, 13 R. I. 146, 419
Cronin v. Vermont Life Ins. Co. (Sup. Ct. of R. I.), 40 Atl. Rep. 497, 675
Doyle, Petitioner, 16 R. I. 537, 256
King v. Batterson, 13 R. I. 117, 737
National Ex. Bank v. Hartford, etc., R. Co., 8 R. I. 375, 10, 11
Tillinghast v. Wheaton, 8 R. I. 536, 347
Whitaker v. Hartford, etc., R. Co., 8 R. I. 47, 11

SOUTH CAROLINA.

Clarke v. Clarke, 46 S. Car. 230, 214
Murray v. Railroad Co., 1 McMullan, 335, 195

UNITED STATES.

Aspden v. Nixon, 4 How. 467, 213
Atherton v. Fowler, 91 U. S. 143, 484
Baskett v. Hassell, 107 U. S. 602, 347
Beall v. New Mexico, 16 Wall. 535, 374, 373
Beer Co. v. Mass., 97 U. S. 25, 254
Burton v. Stratton, 12 Fed. Rep. 696, 535
Carpenter v. Strange, 141 U. S. 87, 210
Cohens v. Virginia, 6 Wheat. 264, 259
Coler v. Cleburne, 131 U. S. 162, 40
Cromwell v. County of Sac, 94 U. S. 351, 711
Douglas v. Kentucky, 168 U. S. 488, 491
Foote v. Women's Bd. of Missions, 162 U. S. 439, 484
Ford v. Williams, 21 How. 287, 736
Geer v. Conn., 161 U. S. 519, 492
Gibson v. Stevens, 8 How. 384, 85
Gibson v. U. S., 166 U. S. 269, 695, 698
Gregory v. McVeigh, 23 Wall. 294, 484
Harris v. Bradley, 2 Dill. 248, 85
Hennington v. Georgia, 163 U. S. 299, 493
Hinckley v. Gilman, etc., R. Co., 94 U. S. 467, 480

Digitized by Google

	Page
Lane County v. Oregon, 7 Wall. 71,	602
Littlefield v. Delaware, etc., Co., 3 Cliff. 371,	260
Lovejoy v. Murray, 3 Wall. 1,	341
M'Neill v. Hill, 1 Wool. 96,	87
Mager v. Grima, 8 How. 490, 211,	600
Mfg. Co. v. Trainer, 101 U. S. 51,	533
Mayor v. Ray, 19 Wall. 468,	42
Morgan v. R. R. Co., 96 U. S. 716,	282
Mo., Kan., etc., R. Co. v. Haber, 169 U. S. 613,	492
Mugler v. Kansas, 123 U. S. 623,	254
New England, M. L. I. Co. v. Woodworth, 111 U. S. 138,	561
N. K. Fairbank Co. v. Central Lard Co., 64 Fed. Rep. 133,	535
Patch v. White, 117 U. S. 210,	286
Plumley v. Mass., 155 U. S. 461,	491
Respublica v. Sparhawk, 1 Dal. 357,	254
School Dist. v. Ins. Co., 101 U. S. 472,	534
Schunk v. Moline, M. & S. Co. 147 U. S. 500,	388
Scott v. Donald, 165 U. S. 58,	492
Smith v. Bolles, 132 U. S. 125, 135,	138
Stacy v. Thrasher, 6 How. 44,	209
Supreme Conclave, etc., v. Cappella, 41 Fed. Rep. 1,	544
Tappan v. Merchants' Nat. Bank, 19 Wall. 490,	603
Transportation Co. v. Chicago, 99 U. S. 635,	695
Watson v. Sutherland, 5 Wall. 74,	341
Yick Wo v. Hopkins, 118 U. S. 356,	600
VERMONT.	
Cabot v. Christie, 42 Vt. 121,	139
Dano v. Sessions, 65 Vt. 79,	140
Mallory v. Leach, 35 Vt. 156,	140
Shanks v. Whitney, 66 Vt. 405, 133,	137
VIRGINIA.	
Coleman v. McMurdo, 5 Rand. 51,	374
WISCONSIN.	
Collette v. Weed, 68 Wis. 428,	158
Ford v. Ford, 70 Wis. 19, 72 Wis. 621,	219
Melms v. Pabst Brew. Co., 93 Wis. 153,	282
Van Steenwyk v. Washburn, 59 Wis. 483,	218

ERRATA.

Vol. 69, p. 707, 8th line from foot, for "54 Conn. 232" read 56 Conn. 208.
Vol. 70, p. 15, 16th line from foot, for "defendant" read plaintiff.
p. 15, 13th line from foot, for "defendant" read plaintiff.
p. 33, 2d line from foot, for "presenting" read prescribing.
p. 64, 14th line from foot, for "245" read 345.
p. 105, 20th line from top, for "formerly" read formally.
p. 211, 3d line from top, for "531" read 431.
p. 316, 14th line from foot, for "received" read viewed.
p. 380, 7th line from foot, for "defendant" read plaintiff.
p. 440, 9th line from top, for "*quære*" read *quare*.
p. 440, 13th line from top, for "*quære*" read *quare*.
p. 480, 14th line from foot, for "809" read 889.
p. 628, 8th line from top, for "defendant" read plaintiff.

All errors in Vol. 70, noted above, have been corrected in the plates from which the bound volume is printed, and consequently appear only in the sheets first issued.

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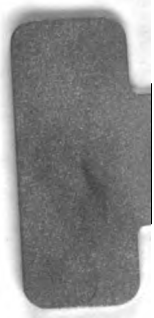

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